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SUPREME COURT, U.S.

NO. 80-6600

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

TYRONE C. WILLIAMS,

Petitioner

-vs-

THE STATE OF OHIO,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT OF OHIO, HAMILTON COUNTY, OHIO.

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QUESTIONS PRESENTED

I. WHETHER, IN A STATE CRIMINAL PROSECUTION, THE FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES PERMIT THE ADMISSION INTO EVIDENCE OF A TAPE RECORDED CONFESSION (A) AT THE OUTSET OF WHICH THE ACCUSED REQUESTS AN ATTORNEY, (B) AND QUESTIONS HIS ABILITY TO AFFORD ONE, (C) AND THE INTERROGATING OFFICERS IGNORE HIS REQUEST FOR COUNSEL, (D) FAIL TO CEASE THE INTERROGATION, BUT (D) IMMEDIATELY SUGGEST, IN PROCEEDING WITH INTERROGATION, THAT TWO OTHER SUSPECTS HAVE GIVEN STATEMENTS, AND THAT UNLESS AND UNTIL THE ACCUSED GIVES A STATEMENT, HIS SIDE OF THE STORY WILL NOT BE KNOWN, (E) FOLLOWING WHICH SUGGESTION, THE ACCUSED GIVES A CONFESSION. THE DECISION BELOW IS IN CONFLICT WITH A HOST OF DECISIONS OF THIS COURT, FROM MIRANDA V. ARIZONA TO AND INCLUDING RHODE ISLAND V. INNIS.

II. WHETHER THE SIXTH AND FOURTEENTH AMENDMENT RIGHT TO AN IMPARTIAL JURY IS VIOLATED WHERE THE TRIAL COURT, IN A CAPITAL CRIMINAL CASE, PERMITS THE RETENTION ON THE JURY OF A JUROR WHO THRICE EQUIVOCATES WHEN ASKED IF SHE CAN REMAIN IMPARTIAL IN THE FACE OF IMPROPER CONTACT WITH THE JUROR BY AN UNAUTHORIZED PERSON, AFTER TRIAL HAS COMMENCED.

III. WHETHER THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT IS VIOLATED BY THE EXCLUSION OF THE ACCUSED FROM AN IN CAMERA HEARING INTO WHETHER THE IMPARTIALITY OF SEVERAL JURORS HAS BEEN COMPROMISED BY CONTACT DURING TRIAL WITH AN UNAUTHORIZED PERSON.

IV. WHETHER THE FOURTH, FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE VIOLATED BY THE ADMISSION INTO EVIDENCE OF A PISTOL SEIZED AND STATEMENTS MADE IMMEDIATELY FOLLOWING THE WARRANTLESS ARREST OF THE ACCUSED IN HIS HOME, AND MADE IN THE FACE OF HIS DEMAND THAT POLICE LEAVE THE PREMISES UNLESS POSSESSED OF A WARRANT. THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN PAYTON V. NEW YORK AND RIDDICK V. NEW YORK.

V. WHETHER POLICE, POSSESSED WITH NO WARRANT FOR THE ARREST OF A SUSPECT THEY ARE SEEKING, AND WHO ARE ADMITTED TO THE HOME OF THE SUSPECT BY THE SUSPECT'S SISTER, ARE REQUIRED TO LEAVE THE PREMISES WITHOUT MAKING AN ARREST OR SEIZING EVIDENCE UPON DEMAND OF THE SUSPECT THAT THEY PRODUCE A WARRANT OR LEAVE.

VI. WHETHER THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS IS VIOLATED BY THE IMPOSITION OF CONSECUTIVE SENTENCES FOR AGGRAVATED MURDER AND THE AGGRAVATED ROBBERY WHICH IS A NECESSARY, CONSTITUENT ELEMENT OF THE AGGRAVATED MURDER, AND WHICH FORMS THE BASIS FOR ENHANCED PUNISHMENT FOR THE MURDER.

PLEASE NOTE: All parties to this action are named in the caption.

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PETITION

Tyrone C. Williams, Petitioner herein, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the First Appellate District of Ohio, Hamilton County, Ohio affirming his conviction for aggravated murder. The decision of the Court of Appeals was rendered November 19, 1980, and the Ohio Supreme Court declined to review the case on March 4, 1981.

OPINIONS BELOW

The judgment of the Court of Appeals, rendered on November 19, 1980, is unreported and appears as Appendix A to this Petition, Post. at p.23 . The decision of the Ohio Supreme Court denying review, dated March 4, 1981, is appended hereto as Appendix B, post., p. 36.

JURISDICTION

The final order of the Supreme Court of Ohio denying review was entered March 4, 1981. This Petition is timely filed, and jurisdiction is founded on 28 U.S.C. § 1257 (3), Petitioner having asserted below and in this Court a denial of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

The Fifth Amendment provides, in pertinent part:

> . . . nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

The Sixth Amendment provides, in pertinent part:

> In all criminal pro secutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury . . . . and to have the Assistance of Counsel for his defence.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

The Fourteenth Amendment provides, in pertinent part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPLICABLE PROVISIONS OF THE OHIO REVISED CODE:

§ 2903.01 Aggravated murder.

. . . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

§ 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of § 2903.01 of the Revised Code shall suffer death or be imprisoned for life. [The death penalty portions of the Ohio statutes were stricken by this Court in Lockett v. Ohio, 438 U.S. 586 (1978) and Bell v. Ohio, 438 U.S. 637 (1978), and Petitioner's death sentence was reduced to life imprisonment on May 16, 1980, almost two years thereafter, when the Court below finally granted the motion we had filed in 1978. The rest of the penalty statute is thus irrelevant to this appeal.]

§ 2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in § 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in § 2923.11 of the Revised Code on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

§ 2929.11 Penalties for felony.

. . . .

(B) Terms of imprisonment for felony shall be imposed as follows:

(1) For a felony of the first degree, the minimum term shall be four, five, six or seven years, and the maximum term shall be twenty-five years.

§ 2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment. . . . .

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of division (B) of § 2917.02 of the Revised Code [prohibiting certain acts of inmates of penal institutions], § 2921.34 of the Revised C ode, or division (B) of § 2921.35 of the Revised C ode [prohibiting escape of aiding escape of an inmate].

(3) When it is imposed for a new felony committed by a probationer, parolee or escapee.

§ 2935.12 Forcible entry in making arrest.

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

CRIMINAL RULE 43(A) RULES OF CRIMINAL PROCEDURE OF THE STATE OF OHIO.

RULE 43 (A) Defendant's presence.

The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition

of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent the continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

STATEMENT OF THE CASE

On April 19, 1977, one Jeffrey Stahl, a high school student working in a filling station in suburban Cincinnati, Hamilton County, Ohio, was found at the station, shot dead. The cash box was open and $166 was later determined to have been taken. Earlier that evening, sheriff's deputies had investigated an incident involving Petitioner, one Metz, and a juvenile, in which the three had allegedly pulled a gun on a fourth youth. The deputies picked up Metz and the juvenile, and they gave statements which led the deputies to appellant's home.

The deputies went to Petitioner's home, without a warrant for his arrest or for the search of his home. They were admitted by his sister. Petitioner demanded a warrant and ordered the deputies to leave, but they ignored his request and physically arrested him. He then showed them a stereo in which they found the gun which had fired the bullet which killed Stahl. Admissions were also allegedly made by Petitioner to the officers.

Petitioner was taken to police headquarters, where a taped statement was attempted. Petitioner was advised of his Miranda warnings on the tape, and then he was asked if he understood his rights and whether he wished to talk to the deputies at that time. Petitioner then requested an attorney and questioned his ability to afford one. The deputies then assured Petitioner that he had a right to an attorney, but that the other two suspects had made statements and the officers did not know Petitioner's side of the story. Petitioner then blurted out his confession, without having seen the attorney

he requested, nor having affirmatively waived his right to counsel. He admitted possessing the gun, that it went off when in his possession, that the shot hit Stahl, and that Petitioner had no intent to kill the unfortunate youth.

Indicted for aggravated murder with the specification that the killing was accomplished during the course of an aggravated robbery [making the offense a capital offense], and in a second count charging the aggravated robbery itself, Petitioner filed motions to suppress his statements and the gun from evidence.* The motions were denied, in a pretrial hearing, and a jury was impaneled and sworn.

During the view of the scene of the crime, and before any testimony was adduced, the service station manager improperly spoke to five of the jurors. When the trial resumed in the courtroom, Petitioner's counsel moved for a mistrial. The trial court, after ascertaining which jurors had heard the manager's comments, held a conference in chambers with each juror individually, on the record, with both counsel present, but from which Petitioner was excluded, without objection from his attorney. At that conference, four of the five jurors unequivocally stated that they could place from their minds the comments of the station manager, but the fifth juror, on three separate occasions, equivocated as to whether she could remain impartial. She was permitted to remain on the jury, however, the motion for a mistrial was denied, and Petitioner was convicted and sentenced to death on the aggravated murder count, and to 7-25 years imprisonment on the aggravated robbery count, to be served consecutively.

*The motions to suppress raised the Fourth and Fifth Amendment claims in the trial court; the motion for a mistrial raised the Sixth Amendment jury impartiality question; exclusion of Petitioner from the in camera hearing raises the due process question, and the consecutive sentences raise the double jeopardy question. The Payton and Whalen issues were not specifically addressed in the trial court because the trial antedated those decisions by two years. All were raised on direct appeal.

Petitioner appealed to the Court of Appeals for the First Appellate District of Ohio, for Hamilton County, and was unsuccessful, except that the Court, almost two years after the death penalty in Ohio was abolished pursuant to this Court's decisions in Lockett v. Ohio and Bell v. Ohio, supra., did reduce the death sentence on the aggravated murder count to one of life imprisonment. From that November 19, 1980 affirmance, Petitioner appealed to the Ohio Supreme Court, which denied review on March 4, 1981, because "no substantial constitutional question exists herein."

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW THAT THE INTERROGATION OF PETITIONER IMMEDIATELY AFTER HE REQUESTED AN ATTORNEY AND QUESTIONED HIS ABILITY TO AFFORD ONE WAS CONSTITUTIONALLY PROPER IS IN CONFLICT WITH EVERY DECISION OF THIS COURT FROM MIRANDA V. ARIZONA TO RHODE ISLAND V. INNIS WHICH DEALS WITH THE QUESTION OF WAIVER OF THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF INCRIMINATION. IT IS AN AFFRONT TO THE CONSTITUTION AND TO THIS COURT AND MUST BE REVIEWED AND REVERSED.

Before consideration of the law in question, it is deemed necessary to set forth, verbatim, the tape recorded statement given by Petitioner as it concerns the question as to whether he did waive his privilege against self-incrimination, and his right to counsel. The excerpt also appears verbatim in the opinion of the court below, see opinion, post. p. 25-26:

> [First, Petitioner's Miranda warnings were properly given]
>
> [Officer McLaren]: With these rights in mind do you want to talk to us at this time?
>
> A [Petitioner]: Depending on what?

Q Did you understand what I just said?

A Yes.

Q Do you wish to talk to us at this time?

A I would like to have an attorney, you know. [Here, the tape is unclear. Petitioner further stated either "If I can afford one" or "But I can't afford one"].

Q [Officer Simmons]: Okay, Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also weren't they?

A Yes, sir.

Q Okay, you understood the part where it said that you could start to talk to us and stop at any time you wanted to, didnt you?

A Yes.

Q Okay, you understood each and all your rights?

A I surely did.

Q Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or . . .

A I know I can say I didn t plan no robbery. I have no idea of it at all.

Q Well we have to . . . , in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guys side of the story but we don't know just what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said you can and stop at any time or you can have an attorney. That's your prerogative.

A I know Tony Metz, Tony Metz had the . . . , I had the gun. . . . [Thereafter, Petitioner blurted out the whole story of how he had the gun and how it went off, fatally wounding Stahl].

Despite the foregoing, Petitioner's Fourth and Fifth Amendment motions to suppress evidence were denied, the tape was played to the jury with devastating effect, and Petitioner was convicted and sentenced to death.

Where a criminal suspect in custody states that he wants an attorney, "the interrogation must cease until an attorney is present." Miranda v. Arizona, 384 U.S. 436, 474 (1966). Where the suspect indicates that he wants an attorney

but cannot afford one, the interrogation also must cease, Id.

"Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under Miranda refers not only to express questioning but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police know are reasonably likely to elicit an incriminating response from the suspect. The latter portions of this definition focuses primarily upon the perceptions of the suspect, rather than the intent of the police. . . . A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation," Rhode Island v. Innis, ___U.S.___, 100 S. Ct. 1682, 1689. [Emphasis added].

Of course, "advising a defendant that a henchman has given a statement[is one] psychological ploy which the rule in Miranda was designed to prevent," State v. Doak, 49 Ohio App.2d 161, 360 NE2d 48, at 49. Such is precisely what occurred here. After Petitioner requested an attorney and questioned his ability to afford one, the interrogating officers then, under the guise of ascertaining whether Petitioner really understood his rights, ignored his request and indicated that Metz and the juvenile had made statements, had given "their side of the story," and that the officers would not know Petitioner's side of the story unless and until he told them. The officers, under the guise of protecting Petitioner's rights, used one of the"oldest tricks in the book" and wheedled from him a tape recorded statement that could well have placed him in the electric chair.

The Court below found that the officers were merely ascertaining Petitioner's intent, and that the questioning did not amount to the "subtle 'interrogation' as that term is defined in Rhode Island v. Innis. . . " Opinion, post. at p. 28. To be sure, it was not subtle. But it was interrogation. Were it not for the ploy of suggesting that Petitioner could clear up the record and correct the"stories" given by the other suspects (which versions of the offense implicitly placed Petitioner in the worst light), the opinion below might have surface appeal. Use of the ploy, however, renders the decision below ludicrous.

The Court below relied upon a Second Circuit case, United States v. Collins, 462 F.2d 792 (2 Cir.1972), and ignored later decisions of this Court, all of which reiterated the holding in Miranda that when a suspect in custody asks for attorney, the interrogation, for the time being at least, must cease: Michigan v. Mosely, 423 U.S. 96 (1975), Brewer v. Williams, 430 U.S. 387 (1977), Mincey v. Arizona, __U.S.__, 98 S.Ct. 2408 (1978), and Rhode Island v. Innis, supra. The decision below is consequently an affront to the Constitution and to the supremacy clause, as it totally ignores the decisions of this Court which mandate the suppression of the taped statement from evidence. The decision below should be reviewed and reversed, as it endorses the violation of Petitioner's Fifth Amendment privilege against self-incrimination, which privilege it is the duty of the States to protect, under the due process clause of the Fourteenth Amendment, Malloy v. Hogan, 378 U.S. 1 (1964).

II. THE SIXTH AND FOURTEENTH AMENDMENT GUARANTEES OF AN IMPARTIAL JURY ARE DENIED TO AN ACCUSED WHERE HE IS TRIED BY A JURY WHICH INCLUDES A JUROR WHO THRICE EQUIVOCATES WHEN ASKED TO AFFIRM HER IMPARTIALITY AFTER SHE HAS BEEN SUBJECTED TO IMPROPER CONTACT OUTSIDE OF THE COURT PROCEEDINGS.

The Sixth Amendment guarantees to every accused in a serious criminal case the right to trial by an impartial jury, and the Fourteenth Amendment Due Process Clause imposes the requirement to provide impartial juries on the states as well as on the federal government, Duncan v. Louisiana, 391 U.S. 145 (1968). When a juror, potential or already sworn, is challenged as partial, the trial court must determine whether the opinion formed is such as to indicate the presence of bias, Reynolds v. United States, 98 U.S. 145 (1898).

"Impartiality is not a technical conception. It is a state of mind. For the ascertainment of this mental attitude of appropriate indifference, the Constitution lays down no particular tests, and the procedure is not chained to any ancient and artificial formula," United States v. Woods, 299 U.S. 123 (1936). A juror's "verdict must be based upon the evidence developed at trial. . . . This is true regardless of the heinousness of the crime charged, the apparent guilt of the offender or the station in life which he occupies." While it is not always possible, or even necessary, to obtain a juror totally ignorant of the facts or devoid of personal opinion, "it is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court," Irvin v. Dowd, 366 U.S. 717 (1961).

The foregoing elementary statement of the fundamental nature of the right to an impartial jury provides a sufficient backdrop for the violation of that right in the trial below. During the view of the premises where the offense occurred, the manager of the service station spoke to several jurors and showed them a dent made by the bullet allegedly fired by Petitioner which allegedly killed the victim. Upon the

jury's return to the courtroom, Petitioner moved for a mistrial. The trial court thereupon held a chambers conference at which each of the five jurors who had indicated that they had heard the manager's comments was individually interrogated on the record. Four of the five indicated unequivocally that they would be able to put the manager's improper comments from their minds. The fifth juror, Miss Kopp, first indicated that she would not be prejudiced by the incident, although not unequivocally ("No, I don't believe so." [Tr.706]). After she had been instructed to return to the jury room, defense counsel requested that she be instructed that her experience at the crime scene was not evidence. Then the following occurred:

> THE COURT: Just a minute, Miss Kopp. I do want to instruct you that what was said was not evidence and it should not be considered in any way and you have assured me that you will not consider it in any way, is that correct?
>
> Would you say yes for the record?
>
> MR. GAINES [Defense counsel]: I think the record should reflect that the prospective (sic) juror shrugged her shoulders.
>
> THE COURT: Will you disregard it and not consider it in any way?
>
> JUROR KOPP: Yes, I suppose so.
>
> THE COURT: Okay. Thank you.
>
> MR. GAINES: I believe the answer was yes, I suppose so. I would like the record to reflect that.
>
> THE COURT: Ma'am, did you want to say something?
>
> JUROR KOPP: I don't know. I'm confused about the whole thing.
>
> THE COURT: Well, I'm asking you to set aside anything you have heard which you said you would do originally when you were accepted as a juror. Will you do that?
>
> JUROR KOPP: Yes.
>
> THE COURT: Thank you.
>
> MR. GAINES: Your Honor, I hate to -- the juror seems to have some reservation. I don't know.

THE COURT: She's indicated she will and I'm going to ask that you step in the jury room.

[Tr. 706-707, emphasis added].

The colloquy with Juror Kopp thus ended. The motion for a mistrial was denied, and juror Kopp remained on the jury which ultimately convicted Petitioner of aggravated murder, paving the way for the sentence of death which was not vacated until May, 1980. His conviction still stands, however.

The Court below gave short shrift to Petitioner's claim that his mistrial motion should have been granted, or, in the alternative, that Juror Kopp should have been removed and the trial continued with an alternate in her place. The Court below simply held that since Juror Kopp also did state that she could be impartial, that the trial court, as the judge of her credibility,did not abuse his discretion in retaining her on the jury. The court below misapprehended our claim. The claim is more than one of credibility or lack of it. We do not state that the trial court misunderstood her comments; indeed, they are spread on the record for all to see. We claim that the juror's expressed beliefs be given their true and plain meaning-- that she was unsure and ambivalent about her impartiality. The questions were not difficult, and to a truly impartial juror, would have been such as to engender prompt, correct, firm and unequivocal answers. The shrug of the shoulders, the "I suppose so" the "I don't know, I'm confused about the whole thing" answers absolutely belie the trial court's finding that she could remain impartial -- she was not even sure that she could be impartial. Yet she was permitted to remain on Petitioner's jury, a jury which convicted him as charged on all counts. Petitioner's Sixth and Fourteenth Amendment rights to an impartial jury were grossly violated below, and this case should be reviewed and reversed so that Petitioner can be retried by a fair and impartial jury as is his right.

III. THE EXCLUSION OF PETITIONER FROM THE HEARING INTO WHETHER THE JURORS HAD BEEN PREJUDICED DEPRIVED HIM OF DUE PROCESS OF LAW GUARANTEED HIM BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Normally, questions concerning the denial of the right of one on trial for a criminal offense to be present at his trial are concerned with violations of the Sixth Amendment right to confrontation. Yet there are due process aspects to the denial of the right to be present which are wholly independent of the right to confront the witnesses against the accused. The due process clause of the Fourteenth Amendment is denied by the absence of the accused from the proceedings to the extent that "a fair and just hearing would be thwarted by his absence," Snyder v. Massachusetts, 291 U.S. 97 (1933), at 107. This Court has held that the presence of the accused is required at the voir dire selection process, and the right is not satisfied by the presence of counsel only, Hopt v. Utah, 110 U.S. 574 (1884). Given the right to be present at the voir dire, "The defendant's presence at a hearing to determine whether the jurors have engaged in misconduct seems to be no less crucial as a safeguard of his right to an impartial jury," Commonwealth v. Robichaud, 264 NE2d 374, 375 (Mass. 1970).

> It goes without saying that the right to a trial by an impartial jury is a most fundamental one. The right of the accused to be present at all stages of the trial where his substantial rights may be affected is an equally fundamental one. . . . It would seem that the examination of a jury during the progress of a trial as to alleged misconduct affects a defendant's substantial rights to a trial by an impartial jury at least as much, if not more, than does an examination for qualifications or the making of challenges. All concern the impartiality of the jury which cannot be considered a preliminary, formal, or inconsequential matter. . . . Where such fundamental rights are denied, . . . neither party is put to the burden of showing actual injury or prejudice or the lack of it. Injury is conclusively presumed.

People v. Medcoff, 73 N.W.2d 537, 543 (Mich. 1955).

Here, Petitioner claims a deprivation of his due process rights because of his exclusion from the in camera hearing as to the question of the jurors' ability to continue as impartial jurors in light of the improper conduct of the service station manager. The claim is identical to that in Nevels v. Parratt, 596 F.2d 344, cert. den. 444 U.S. 859 (8th Cir. 1979). The Court there concluded, as did the Court below, that it was error to exclude the defendant from the in camera hearing, but that the error was harmless. The Nevels Court concluded that the error was harmless beyond a reasonable doubt, as required by Chapman v. California, 386 U.S. 18 (1967). Our Court below did not so find, merely concluding that the admitted error was not prejudicial.

The crucial feature of Nevels is the reasoning which formed the basis for the Eighth Circuit's conclusion that the error was harmless: At the hearing in camera the juror "reaffirmed his ability to remain fair and impartial and his realization of the importance of fairness to both appellant and the state. He further stated that nothing said at the bar [where the juror had discussed the case with a law student] was carried into his deliberations and assured the court that no one attempted to influence his decision. . . . . Appellant's counsel did not move for a mistrial." 596 F.2d at 345.

The Nevels Court concluded that the error was harmless beyond a reasonable doubt because "The state has shown that the juror remained impartial and that neither the occurrence at the tavern nor the in camera hearing affected his ability to remain fair and impartial." 596 F.2d at 346.

Here, of course, the facts are quite the opposite. Defense counsel did move for a mistrial. The juror was ambivalent, to say the least, as to her ability to remain impartial. The Court of Appeals held, however, that nothing could have been accomplished by Petitioner's presence, and that the error was thus harmless.

Further, there was no express waiver by Petitioner of his right to be present, nor even the showing that he was aware of the right to be present. Absent a knowing relinquishment of a known right or privilege, no waiver of a constitutional right exists, Johnson v. Zerbst, 304 U.S. 458 (1938), nor can waiver be presumed by the silent record that exists here, Carnley v. Cochran, 369 U.S. 506 (1962).

The incorrectness of the decision below, however, can best be exemplified by an example cited by that very court. The Court cites several cases holding that prejudice is presumed where the accused is absent during the charge to the jury. No area of a trial exists in which the accused is of less assistance to his attorney, as that is the only stage of the trial dealing purely with the rules of law. Yet if prejudice is presumed where the accused is not present during a charge, he must be more prejudiced where he is not present during a factual inquiry as to whether a juror can remain impartial in the face of improper contact by an outsider to the proceedings. Petitioner's very presence might have convinced the juror to admit what she apparently felt, but could not bring herself to directly state: that she could no longer act as an impartial juror in Petitioner's case. Such ambivalence has no place in a juror in any case, much less in a criminal case in which the accused is on trial for his life. Petitioner's right to due process was denied by Petitioner's exclusion, and he is entitled to a reversal and a new trial before a truly impartial jury.

IV. THE DECISION BELOW THAT EVIDENCE OBTAINED AS THE DIRECT RESULT OF THE WARRANTLESS INVASION OF PETITIONER'S HOME TO EFFECTUATE HIS ARREST WAS NONETHELESS ADMISSIBLE, IS AN AFFRONT TO THE FOURTH AND FOURTEENTH AMENDMENT PROTECTION OF A CITIZEN'S HOME, AND IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN PAYTON v. NEW YORK, 445 U.S. 573 (1980).

It is anticipated that the Respondent will argue that this issue was not properly raised below, as Petitioner's motion to suppress did not directly attack the search and seizure of the gun, the admission of the oral statements nor the taped statement which flowed from the original arrest. However, the trial was held two years prior to this Court's decision in Payton v. New York, supra., and the Court below permitted us to raise and argue the Payton issue, and decided it on its merits. Failure to object to a long-standing practice under Ohio law does not waive the right to review of an issue related to that practice where this Court has, in the interval between the trial and the appellate review, ruled that practice unconstitutional. O'Connor v. Ohio, 385 U.S. 92 (1966).

While the Court of Appeals did rule on the merits on Petitioner's Payton claim, that ruling leaves much to be desired, however. That court distinguished our case from Payton because here police were admitted to Petitioner's home by Petitioner's sister. The court thus ignored the ruling in Payton's companion case, Riddick v. New York, 445 U.S. 573 (1980) in which this Court held that the admission by police by the son of the accused did not and should not alter the result.

Payton, of course, held that a warrantless arrest within the confines of the home of a criminal suspect violates his rights under the Fourth and Fourteenth Amendments, and any evidence seized as a result of such arrest must be suppressed from evidence.

We have acknowledged that the Payton issue was not specifically raised in Petitioner's motion to suppress, although Fourth and Fourteenth Amendment rights were alleged to have been violated, as well as the Fifth Amendment privilege against self-incrimination in the obtaining of the oral statements following the arrest. There is evidence, however, of the fact that the Payton rule was violated. Petitioner testified at the hearing on the motion to suppress that he demanded a warrant when he was made aware of the presence of the officers:

> I told them, do you have a warrant to come here and arrest me? They said not, that's none of your concern. I said, what do you mean, it's nothing of my concern? I mean, this is my house, you know, my premises, and I have the right to ask do you have a warrant to arrest me. If not, you can leave.

(Vol. I. R., p. 13).

There was no showing here of exigent circumstances. The police could have had a warrant signed by radio call to headquarters, and could have done so within minutes. They did not, but chose to pass over Petitioner's threshold and make a warrantless arrest. An Ohio statute, § 2935.12, did grant ostensible authority to do so, but the vitality of that statute in light of Payton and Riddick is indeed questionable. "In terms that apply equally to seizures of property and to seizures of persons, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." Payton, 100 S.Ct. at 1382.

Under Wong Sun v. United States, 371 U.S. 471 (1963), the arrest herein being illegal, all evidence obtained by the exploitation of the primary illegality must be suppressed as the fruit of the poisonous tree, including not only the items of tangible, physical evidence, but also Petitioner's oral statements. Wong Sun itself involved a statement obtained pursuant to an unlawful arrest, but the Court did not address

the admissibility of that statement directly, as time and other circumstances had sufficiently attenuated the taint occasioned by the unlawful arrest; here, however, the oral statements and the taped statement followed closely upon the making of an unlawful arrest, and can not be reasonably found to have been attenuated by either time or circumstance.

Accordingly, the warrantless arrest within the confines of Petitioner's residence having formed the basis of several constitutional violations, the decision of affirmance below, in conflict with so many decisions of this Court, merits review and reversal.

V. THE QUESTION OF WHETHER POLICE OFFICERS WHO HAVE NO WARRANT FOR THE ARREST OF THE SUSPECT TO WHOSE HOME THEY HAVE BEEN ADMITTED BY A RELATIVE OF THE SUSPECT MUST LEAVE THE PREMISES WITHOUT MAKING SUCH ARREST UPON DEMAND OF THE SUSPECT, WAS NOT DECIDED IN PAYTON V. NEW YORK, SUPRA., IS RIPE FOR REVIEW, AND IS SQUARELY PRESENTED BY THIS CASE.

We shall not reiterate the argument in the previous section of this Petition. The question herein stated has occurred to us as being a correlative to that presented and decided in Payton, and is squarely presented here.

Even if the Court below is correct in concluding that, the holding in Riddick aside, the police were properly in the house, the question remains, were the police obligated to leave the premises upon demand by Petitioner, or, to the contrary, once properly on the premises, were they permitted to remain, without a warrant, in the face of the demands of the Petitioner that they leave? The only constitutional answer to this question, given the decision in Payton and Riddick, is that the police were obligated to leave, without making the arrest.

This question presents an issue which has arisen, and which could arise, only after the decision of this Court in Payton and Riddick, and should be decided to clarify the application of those important cases.

VI. THE DECISION BELOW, AFFIRMING THE CONSECUTIVE SENTENCES IMPOSED ON PETITIONER FOR THE AGGRAVATED MURDER AND THE AGGRAVATED ROBBERY WHICH CONSTITUTES ONE OF THE ESSENTIAL ELEMENTS OF THE CRIME OF AGGRAVATED MURDER CONSTITUTES IMPOSITION OF MULTIPLE PUNISHMENTS FOR THE SAME OFFENSE, IN VIOLATION OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT, AND IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN WHALEN V. UNITED STATES, 445 U.S. 684 (1980).

This question was also not raised in the trial court, and was not raised on direct appeal as well. However, the decision of this Court in Whalen v. United States, supra., was rendered in 1980, two years after Petitioner's trial, and under O'Connor v. Ohio, supra., failure to object to a long-standing Ohio practice cannot bar review where, after the trial, this Court rules that the practice violates the Constitution. Thus, there is no impediment to consideration of the claim here.

We also must acknowledge that the claim raised here is the same as the principal issue raised in Payne v. Ohio, cert.den., 1981, Case No. 80-5696, Justice Stewart voting to grant certiorari. Despite the recent result in Payne, we feel obligated to raise the issue again here.

Under Ohio law, § 2929.41 R.C., sentences may be run consecutively when the trial court so specifies. Such a broad mandate cannot be held reasonably to prevail over the double jeopardy clause of the Fifth Amendment, binding on the states through the due process clause of the Fourteenth Amendment, Benton v. Maryland, 395 U.S. 784 (1969). The protection of the double jeopardy clause proscribes, in additional to multiple trials for the same offense, multiple punishments for the same offense, North Carolina v. Pearce, 395 U.S. 711 (1969)."Where [as here] consecutive sentences are imposed at a single criminal trial, the role of the constitutional guarantee is limited to assuring that the court does not exceed its

authorization by imposing multiple punishments for the same offense," Brown v. Ohio, 432 U.S. 161 (1977).

While at first blush it appears that aggravated murder, proscribed by § 2903.01 R.C. and aggravated robbery, proscribed by § 2911.01, are separate and distinct offenses, "[i]t has long been understood that separate statutory crimes need not be identical -- either in constituent elements or in actual proof -- in order to be the same within the meaning of the constitutional prohibition." Id. at 164.

The crucial aspect of the Ohio sentencing scheme which brings our situation within the double jeopardy prohibition is that Ohio law requires, to convict and punish for aggravated murder (felony), proof of the felony which converts a plain murder (with a penalty of 15 years to life) to aggravated murder (life) as an essential element of the aggravated murder. Thus, by proving all of the elements of aggravated robbery, the state here obtained conviction of a more severely punishable offense than if it had proved merely murder and aggravated robbery. By proving the robbery as part of the murder, the penalty for the killing was significantly enhanced, from 15-to-life to life (originally, death, inthis case). Then, in addition to the enhanced punishment for the murder, the trial court imposed an additional 7-25 years for the aggravated robbery. Had the state imposed the 7-25 year sentence concurrently, or had the state obtained a conviction of plain murder, a sentence of 15-life thereon and then an additional 7-25 for the aggravated robbery, Petitioner would have no cause to complain. But Ohio, in obtaining the death (now life) sentence by relying on proof of theaggravated robbery, cannot now constitutionally add thereto the penalty for the robbery without which it could not have received the maximum sentence for the greater penalty of aggravated murder. And therein lies the constitutional violation.

For the foregoing reasons, Petitioner's consecutive sentences violated the due process clause of the Fourteenth Amendment, which incorporates within it the double jeopardy prohibition of the Fifth Amendment, and should be reviewed and reversed.

C O N C L U S I O N

Rarely within the factual parameters of a single case have there been involved so many important constitutional questions. Rarely in the annals of reported case law have so many fundamental decisions of this Court been ignored by a single state court in a single case. Rarely in the history of oppression outside of the realm of fiction have so many of a citizen's rights been flouted. It is as though, by a single bill of attainder, the Bill of Rights were ruled not to apply to Petitioner. Indeed, we would not be surprised to learn that, in addition to the violations of his rights under the Fourth, Fifth, Sixth, Eighth (later corrected) and Fourteenth Amendments, troops were quartered in Petitioner's house.

We are aware that this Court of necessity must concern itself with great legal issues, and cannot review every case where some violation of a petitioner's rights may have occurred. This case, however, presents a situation where the multiple constitutional violations almost cost a citizen his very life. By granting certiorari and reversing Petitioner's conviction, the Court can assure that the great decisions protecting the right of a citizen to counsel, preventing him from being forced to incriminate himself, protecting the sanctity of his home, person and personal effects from unreasonable searches and seizures, from twice being

punished for the same offense, to a fair and impartial jury, and to the right to be present during the crucial stages of criminal proceedings against him, will once again retain their vitality. If the decision below is permitted to stand, however, then state courts, and the court below in particular, will perhaps feel that they have been given carte blanche to continue the gross violation of rights which was countenanced by the Court below.

This Court is respectfully urged to grant certiorari and to reverse the conviction and sentences imposed below, and to remand the case for a new trial at which the provisions of the Bill of Rights are given their true and obvious meaning.

Respectfully submitted,

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IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

STATE OF OHIO,	:	NO. C-780295
Plaintiff-Appellee,	:	
vs.	:	DECISION.
TYRONE C. WILLIAMS,	:	
Defendant-Appellant.	:	

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Mr. H. Fred Hoefle, 400 Second National Building, 830 Main Street, Cincinnati, Ohio 45202, for Defendant-Appellant.

PER CURIAM.

This cause came on to be heard upon the appeal, the transcript of the docket, journal entries and original papers from the Court of Common Pleas, Hamilton County, Ohio, the transcript of the proceedings, the briefs and arguments of counsel.

Now, therefore, the assignments of error having been fully considered are accordingly passed upon in conformity with App. R. 12(A) as set forth herein.

Defendant-appellant Tyrone Williams was indicted, along with Kevin Metz, on charges of aggravated murder with a specification

and aggravated robbery. A separate trial by jury was held in September, 1977, and Williams was found guilty on all charges. Williams received the death sentence on the aggravated murder count and a sentence of 7 to 25 years on the aggravated robbery charge. From this judgment he appeals. On May 16, 1980 this court, acting on a motion by Williams, reduced the death sentence to one of life imprisonment.

Shortly before midnight on April 19, 1977 a motorist drove into the Speedway gas station at the corner of Pippin and Galbraith roads in Hamilton County, Ohio. There he discovered the body of the attendant, a high school student named Jeffrey Stahl, who had been shot in the chest. The cash box on the counter was open, and it was later determined that about $166 had been taken from the station. Sheriff's officers earlier that evening had investigated an incident in which two men and a juvenile -- appellant Williams, Kevin Metz, and the juvenile -- had pulled a gun on a young boy in a subdivision near Speedway. The officers decided to talk to these three about the Speedway murder. They picked up the juvenile and Metz, who gave statements which caused the police also to talk to Williams and place him under arrest for the robbery and homicide. Williams eventually led the officers to a stereo set in his house where a gun was concealed.

Williams presents eight assignments of error for review. The first, challenging the imposition of the death penalty, is now moot as a result of this court's entry on May 16, 1980 which reduced the penalty to life imprisonment. The second assignment charges trial court error in overruling the motion to suppress appellant's

taped and oral statements and the pistol recovered from his residence. Appellant argues that the police who questioned him violated his rights by continuing to interrogate him when he said he wanted an attorney and by not providing an attorney for him when he questioned his ability to afford one.

At the hearing on the motion to suppress the confessions and the evidence, Deputy Sheriff Dennis Pieper testified that he and other officers were admitted to Williams's house by Williams's sister. The officers handcuffed Williams and twice advised him of his rights, including the rights to remain silent, to have an attorney, and to have an attorney appointed if he so desired. After this the officers questioned him about a gun, and Williams led them to a .38 caliber revolver in the stereo. In the car on the way to the station Officer Pieper a third time advised Williams of his rights; and Williams gave inculpatory statements to the officer. At the station, according to testimony by Detective Thomas Simmons, Williams requested to "tell his side of the story." At this point the officers turned on a tape recorder. The first part of the recording consists of Officer McLaren's reading of the full panoply of *Miranda* rights and Williams's responses, indicating that he understood these rights. Then the following colloquy ensued:

> Q. [Officer McLaren]: With these rights in mind do you want to talk to us at this time?
>
> A. [Williams]: Depending on what?
>
> Q. Did you understand what I just said?
>
> A. Yes.

Q. Do you wish to talk to us at this time?

A. I would like to have an attorney, you know. [Here the tape is unclear. Williams further stated either "if I can afford one" or "but I can't afford one."]

Q. [Officer Simmons]: Okay Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also, weren't they?

A. Yes, sir.

Q. Okay, you understood the part where it said that you could start to talk to us and stop at any time you wanted to, didn't you?

A. Yes.

Q. Okay, you understood each and all of your rights?

A. I surely did.

Q. Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or. . .

A. I know I can say I didn't plan no robbery. I have no idea of it at all.

Q. Well we have to. . ., in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guys side of the story but we don't know just exactly what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said you can and stop at any time or you can have an attorney. That's your prerogative.

A. I know Tony Metz, Tony Metz had the..., I had the gun . . . .

No basis exists for suppression of the gun from evidence, since the testimony indicates that appellant voluntarily showed police where the gun was concealed. The oral statement to the officers, after appellant had been apprised of his *Miranda* rights at least twice, likewise was properly admitted into evidence. The admissi-

bility of the taped statement, however, is a more difficult issue to resolve.

In *Miranda v. Arizona* (1966), 384 U.S. 436, 474, the United States Supreme Court held:

> If the individual [a criminal suspect in custody] states that he wants an attorney, the interrogation must cease until an attorney is present. At that time, the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning. If the individual cannot obtain an attorney and he indicates that he wants one before speaking to police, they must respect his decision to remain silent.

In the instant case Williams told the officers at the station that he wanted to make a statement. When he shortly thereafter said that he would like to have an attorney, this position seemingly contradicted his previously expressed desire to give a statement at that particular point in time. In an effort to understand which of these positions Williams actually espoused, the officer reviewed for him his options and asked whether he was choosing to talk or not to talk. When Williams began to talk about the incident, the officer again reminded him of his right to consult an attorney or to refuse to talk. Without replying directly to this statement, Williams then launched into a description of the event, thereby obviously choosing to talk. Under these circumstances we find no interrogation in violation of the *Miranda* rule, but merely a discussion which served to clarify what Williams intended to do at that particular moment in the police station. We find persuasive the language used by the Second Circuit Court of Appeals in *United States v. Collins* (2d Cir. 1972), 462 F.2d 792, 797, and quoted in *State v. Doak* (1975), 49 Ohio App. 2d 161:

> "So long as such reconsideration is urged in a careful, noncoercive manner at not too great length, and in the context that a defendant's assertion of his right not to speak will be honored, it does not violate the *Miranda* mandate."

Appellant argues that this court's decision in *State v. Korn*, No. CA77-07-0084 (1st Dist., Apr. 4, 1979) compels us to reach an opposite result. The case is distinguishable because in *Korn* the defendant was not afforded access to an attorney for a period of several days while interrogation continued. Moreover, we do not consider that the language used by the police in the colloquy with appellant can be categorized as subtle "interrogation" as that term is defined in *Rhode Island v. Innis* (1980), U.S. , 100 S. Ct. 1682. Finally, when appellant chose to talk and thereby abandoned his request for an attorney, the officers were under no obligation to provide him with an attorney.

We conclude that appellant knowingly and voluntarily waived his right to counsel before he gave the officers the taped statement. The assignment is overruled.

Assignment number three charges that the trial court erred in refusing to instruct the jury that the inference or presumption of purposeful killing by use of a deadly weapon could be rebutted, the instruction given by the court having deprived appellant of due process of law. Appellant refers to the following portion of the court's charge to the jury:

> Purpose to kill is an essential element of the crime of aggravated murder. A person acts purposely when it is his specific intention to cause a certain result. It must be established in this case that at the time in question there was present in the mind of Tyrone C. Williams and Kevin Anthony Metz a specific intention to kill.

> Purpose is a decision of the mind to do an act with a conscious objective of producing a specific result. To do an act purposely is to do it intentionally and not accidentally. The purpose with which a person does an act is known only to himself unless he expresses it to others or indicates it by his conduct. The purpose with which a person does an act is determined from the manner in which it is done, the means used and all the other facts and circumstances in evidence. If a wound is inflicted upon a person with a deadly weapon in a manner calculated to destroy life, the purpose to kill may be inferred from the use of the weapon. [Emphasis supplied.] [T.p. 1007-1008.]

The underlined language in the charge *supra* presents a permissive inference to the jury, not a presumption which may or may not be rebutted. Therefore, there was no need for the court to instruct the jury about rebuttal. Appellant contends, nevertheless, that this instruction shifted the burden of proof to him, the defendant, and required him to prove the absence of purpose to kill. We disagree. This instruction did not allow the jury to *presume* purpose to kill from the fact of the use of the weapon and thus require the defendant to prove otherwise. The instruction merely suggested that that the jury *might infer* purpose to kill from the use of the weapon, leaving them free to credit or reject the inference and to draw other, possibly conflicting inferences from "all other facts and circumstances in evidence." The instant case is distinguishable from *Sandstrom v. Montana* (1979), U.S. , 99 S. Ct. 2450. The court held that the presumption at issue in that case could have been interpreted by a reasonable juror as a conclusive presumption. *See also County Ct. of Ulster Cty. v. Allen* (1979), U.S. , 99 S. Ct. 2213, in which the Supreme Court discussed various kinds of inferences and presumptions. The assignment has no merit.

Assignments four, five and six all have reference to an incident which occurred during the jury's view of the scene of the crime. We will discuss assignment number four after numbers five and six.

The record reveals that the manager of the Speedway gas station spoke to several of the jurors, pointing out the location of a bullet hole -- a dent covered with tape on the back wall of the tiny cubicle which served as the station office. The bailiff immediately informed the manager that he was not to have any contact with the jury, and the manager complied with this request. When court reconvened, appellant's attorney moved for a mistrial on the basis of this improper conduct by the station manager. [T.p. 701.] The fifth assignment asserts trial court error in denying the motion for mistrial. We discern no abuse of discretion in the court's denial of the motion. The dent on the wall was one of the features of the scene which the bailiff, at the request of the prosecution, pointed out to the jurors, two at a time -- the maximum number that could fit into the cubicle. Thus the conversation by the manager did not refer to anything other than what the bailiff was authorized to call to the attention of the jurors and did in fact do so. Only five jurors heard the manager's comments. In order to determine whether these jurors could remain impartial, the court conducted an in chambers *voir dire* examination of the five, in which they were instructed not to consider as evidence what they had heard at the scene. This procedure was sufficient to safeguard appellant's right to trial by a fair and impartial jury. *State v. Nuasher*, No. C-76854 (1st Dist. Nov. 11, 1978). The fifth assignment is overruled.

The sixth assignment states that the trial court erred in failing to excuse Juror Kopp after her confused and evasive answers at the chambers conference concerning the improper contact with an unauthorized person during the view. The record contains Kopp's statement that she was "confused about the whole thing" [T.p. 707]. However, the record also shows that she gave affirmative answers to questions by the court, indicating that she could set aside anything she had heard at the scene and not be influenced by it. The trial court observed her demeanor as she spoke. We find no abuse of discretion in the court's decision not to excuse her from the jury. Assignment number six is overruled.

The fourth assignment is stated as follows:

> The trial court erred in conducting a hearing into the possible attempt to influence the jury by a person at the scene of the jury view which hearing was conducted in chambers out of the presence of the appellant and which hearing out of his presence prejudicially deprived appellant of his right to be present at every stage of his trial, and of his right to due process of law under the Fourteenth Amendment to the Constitution of the United States

The record indicates that appellant was not present at the in camera *voir dire* examination of the five jurors, although his attorney and the state's attorney were present. Appellant contends that his exclusion from this hearing constitutes reversible error.

The right of an accused person to be present at trial is guaranteed in Article I, Section 10 of the Ohio Constitution, which provides that "[i]n any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel; . . . to meet the witnesses face to face. . ." Crim. R. 43(A) further provides:

> (A) Defendant's presence. The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. . . .

We hold that it was error for the trial court to have excluded appellant from the *in camera voir dire* proceedings. However, we now must determine whether the error was prejudicial to appellant's right to a fair trial.

In *Jones v. State* (1875), 26 Ohio St. 208, prejudice was presumed when the court gave instructions to the jury, after deliberations had commenced, in the absence of the accused. This precedent has been followed by the Ohio Supreme Court in *State v. Grisafulli* (1939), 135 Ohio St. 87, and by this court in *State v. Hustler Magazine*, No. C-77101 (1st Dist. Apr. 4, 1979); *State v. Allen*, No. C-790720 (1st Dist. Oct. 8, 1980), and *State v. Borbon*, No. C-790786 (1st Dist. Oct. 8, 1980). The instant case, however, can be distinguished from these cases in that the incident in question took place early in the trial, before any evidence was presented, not during the critical stage of jury deliberations. All that transpired at the hearing is on the record, and we have already ruled that the court did not abuse its discretion in allowing the trial to continue with the original jurors.

In *State v. Black*, No. C-77142 (1st Dist., Apr. 12, 1978) the trial court conducted an *in camera* hearing to determine the competency of three minor prospective witnesses. Although counsel were present, the defendant was not, and no objection was made. This court held that the defendant was not prejudiced by this

hearing in his absence. His ability to defend was not adversely affected, nothing took place as to which he could have offered assistance to counsel, and no questions were posed dealing with his conduct.

The case *sub judice* is similar in several respects to *Black*. We view the court's *in camera* examination of the jurors as a proceeding more akin to a competency examination than to communications which instruct on the law of the case. The subject matter of the hearing was not concerned with conduct of the appellant. (Contrast *State v. Howard*, No. C-77010, 1st Dist. Apr. 12, 1978, in which the court found prejudicial error in excluding defendant from an *in camera* preliminary examination of prospective witnesses as to alleged "other acts of the defendant.") Nothing at the hearing adversely affected appellant's ability to defend. Moreover, no argument has been made to suggest how appellant could have aided his counsel had he been present. The record (T.p. 699) contains a statement by appellant's counsel that appellant was to be taken on the view of the premises but would remain in the car. Presumably this is what occurred. Thus he would not have heard the comments by the station manager inside the cubicle and could not have assisted counsel in this respect. The record shows that counsel actively participated in the hearing on behalf of appellant. No objection was made at the time to the fact that appellant was not present.

Appellant presents the additional argument that he was denied due process of law, citing *Snyder v. Massachusetts* (1934), 291 U.S. 97. In that case Justice Cardozo wrote:

> . . . [I]n a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.

In the previous paragraph we have discussed reasons why appellant's absence had no reasonably substantial relation to the fullness of his opportunity to defend. Thus he was not denied due process of law. We conclude that although the court committed error in excluding appellant from the *in camera* proceedings, no prejudice to appellant's rights occurred. Crim. R. 52(A). The fourth assignment is overruled.

The seventh assignment asserts that the judgment is contrary to the manifest weight of the evidence and to law in that the state failed to prove venue beyond a reasonable doubt. No argument was made at trial that venue had not been proved, and the question of venue may not be raised for the first time in the court of appeals. *State v. Loucks* (1971), 28 Ohio App. 2d 77, 274 N.E.2d 773. Moreover, the record contains ample evidence which proves beyond a reasonable doubt that the crime was committed in Hamilton County, Ohio. The assignment lacks merit.

The eighth and final assignment charges that the trial court erred in denying appellant's motion to suppress his taped and oral statements because these statements resulted from an unlawful warrantless arrest in his home. Appellant relies on the decision of the United States Supreme Court in *Payton v. New York* (1980), U.S. , 100 S. Ct. 1371, decided almost three years after the trial in the case *sub judice*. *Payton* holds that the Fourth Amendment prohibits police, in the absence of the exigent circum-

stances, from entering a suspect's home without a warrant and arresting him, and that evidence seized during such a warrantless intrusion must be suppressed. Although appellant did not challenge the taped and oral statements on such a basis at trial, he contends that the fact that he made a Fourth Amendment challenge on other grounds allows him to raise the issue in this appeal. Even assuming *arguendo* that *Payton* could be considered as authority in the instant case, we find it to be distinguishable. The oral and taped statements made by appellant cannot be equated with "evidence seized" in a Fourth Amendment context. Therefore, even were we to hold that under *Payton* Williams's arrest was illegal, we would not be further required by the *Payton* rationale to suppress the statements given to police after the arrest. Moreover, this entry here by police was made with the consent of the resident of the house. The assignment lacks merit.

All assignments of error having been overruled, we affirm the judgment of the trial court.

SHANNON, P. J., KEEFE and BLACK, J. J.

PLEASE NOTE:

The Court has placed of record its own entry in this case on the date of the release of this Decision.

36 HMFBWK 5

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THE SUPREME COURT OF OHIO

THE STATE OF OHIO,
City of Columbus.

19 81 *TERM*

To wit: March 4, 1981

State of Ohio,
Appellee,

vs.

Tyrone C. Williams,
Appellant.

No. 81-73

APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

This cause, here on appeal as of right from the Court of Appeals for HAMILTON *County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.*

FOR YOUR INFORMATION

It is further ordered that a copy of this entry be certified to the Clerk of the Court of Appeals for HAMILTON *County for entry.*

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... Clerk

..... Deputy

SC78 BARRETT BROTHERS, PUBLISHERS, SPRINGFIELD, OHIO

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
City of Columbus.

State of Ohio,
Appellee,

vs.

Tyrone C. Williams,
Appellant.

19 81 TERM

To wit: March 4, 1981

No. 81-73

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS

for HAMILTON *County*

It is ordered by the Court that this motion is overruled.

COSTS:

Motion Fee, $20.00, paid by Affidavit of Poverty

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this ..... day of ..... 19 .....

..... *Clerk*

..... *Deputy*

NO 80-6600

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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SUPREME COURT, U.S.

TYRONE C. WILLIAMS :

Petitioner :

vs. :

THE STATE OF OHIO :

Respondent :

ORIGINAL COPY

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO.

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QUESTIONS PRESENTED

1.) Whether police officers who have properly advised a suspect of his Miranda rights, and obtained a waiver thereof, acted properly in stopping questioning and reviewing again the Miranda warnings when the suspect indicated some confusion.

2.) Whether the trial court, after a full voir dire, is entitled to make discretionary rulings concerning whether or not a seated juror is important and should remain on the jury.

3.) Whether the due process clause of the fourteenth amendment is violated by the voluntary absence of a defendant from an in-chambers voir dire of a juror, conducted after trial commences, and in the presence of defense counsel.

4.) Whether matters not raised or preserved at trial may be raised on appeal.

5.) Whether police may make a warrantless arrest of a murder suspect in his home within hours of the commission of the murder, where the failure to act at once will allow the destruction of evidence and the escape of the felon.

6.) (A) Matters not raised at trial or on direct appeal may not be raised in the Supreme Court.

(B) Whether a state court can constitutionally impose a penalty for a felony murder and the underlying felony, where the state felony murder statute requires proof of only one of a number of possible underlying felonies in order to support a felony murder conviction.

OPINIONS BELOW

The opinion of the Ohio First District Court of Appeals and the journal entry of the Ohio Supreme Court are correctly set forth in the brief of the Petitioner.

JURISDICTION

The final order of the Supreme Court of Ohio denying review was entered March 4th, 1981. Petitioner claims jurisdiction based on 28 U.S.C., section 1257 (3), however Petitioner's 6th question presented does not raise a constitutional issue.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

THE FOURTH AMENDEMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Fifth Amendment provides, in pertinent part:
>
> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Sixth Amendment provides,in pertinent part:
>
> In all criminal pro secutions, the accused shall enjoy the right to a . . . trial . . . by an impartial jury . . . and to have the Assistance of Counsel for his defense.

THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES:

> The Fourteenth Amendment provides, in pertinent part:
>
> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

APPLICABLE PROVISIONS OF THE OHIO REVISED CODE:

Section 2903.01 Aggravated murder.

. . . .

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

(C) Whoever violates this section is guilty of aggravated murder and shall be punished as provided in section 2929.02 of the Revised Code.

Section 2929.02 Penalties for murder.

(A) Whoever is convicted of aggravated murder in violation of Section 2903.01 of the Revised Code shall suffer death or be imprisoned for life.

(Life imprisonment is the only viable option here. Ohio's death penalty was declared unconstitutional by this Court in Lockett v. Ohio, 438 U.S. 586 (1978).

Section 2911.01 Aggravated robbery.

(A) No person, in attempting or committing a theft offense as defined in Section 2913.01 of the Revised Code, or in fleeing immediately after such attempt or offense, shall do either of the following:

(1) Have a deadly weapon or dangerous ordnance as defined in Section 2923.11 of the Revised Code on or about his person or under his control.

(2) Inflict, or attempt to inflict serious physical harm on another.

(B) Whoever violates this section is guilty of aggravated robbery, a felony of the first degree.

Section 2929.11 Penalties for felony.

. . . .

(B) Terms of imprisonment for felony shall be imposed as follows:

(1) For a felony of the first degree, the minimum term shall be four, five, six or seven years, and the maximum term shall be twenty-five years.

Section 2929.41 Multiple sentences.

(A) Except as provided in division (B) of this section, a sentence of imprisonment shall be served concurrently with any other sentence of imprisonment . . . .

(B) A sentence of imprisonment shall be served consecutively to any other sentence of imprisonment, in the following cases:

(1) When the trial court specifies that it is to be served consecutively;

(2) When it is imposed for a violation of division (B) of Section 2917.02 of the Revised Code

(prohibiting certain acts of inmates of penal institutions), Section 2921.34 of the Revised Code (prohibiting escape of aiding escape of an inmate).

(3) When it is imposed for a new felony committed by a probationer, parolee or escapee.

Section 2935.12 Forcible entry in making arrest.

When making an arrest or executing a warrant for the arrest of a person charged with an offense, or a search warrant, the officer making the arrest may break down an outer or inner door or window of a dwelling house or other building, if, after notice he is refused admittance, but an officer executing a search warrant shall not enter a house or building not described in the warrant.

CRIMINAL RULE 43(A) RULES OF CRIMINAL PROCEDURE OF THE STATE OF OHIO.

RULE 43(A) Defendant's presence.

The defendant shall be present at the arraignment and every stage of the trial, including the impaneling of the jury, the return of the verdict, and the imposition of sentence, except as otherwise provided by these rules. In all prosecutions, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent the continuing the trial to and including the verdict. A corporation may appear by counsel for all purposes.

STATEMENT OF THE CASE

a) Procedural Posture

Defendant-appellant Tyrone C. Williams was arrested on April 20th, 1977, in connection with a homicide that occurred late on April 19th, 1977. A preliminary hearing was held on April 27th, 1977 and the defendant was bound over to the Grand Jury. On May 31st, 1977 the Hamilton County Grand Jury returned indictment number B 771201. This instrument charged defendant Williams with Aggravated Murder, Aggravated Robbery and a death penalty specification. Defendant was arraigned on June 3rd, 1977, and entered a plea of not guilty. Defendant's trial to jury began on September 19th, 1977, in the courtroom of Judge Thomas Nurre. Trial concluded on September 28th, 1977 with a verdict of guilty as charged on both counts and on the specification. On April 28th, 1978, a mitigation and sentencing hearing was held. Defendant received a sentence of death on the Aggravated Murder count, and 7-25 years on the Aggravated Robbery count. On May 16th, 1980 the death sentence was reduced to life in prison. On November 19th, 1980, the First District Court of Appeals released its decision affirming appellant's conviction. On March 4th, 1981 the Ohio Supreme Court, by entry, declined to review the decision.

b) Facts

1) Discovery of crime

Shortly before midnight on April 19th, 1977, Jerry Singleton drove his car into the Speedway gas station located at the corner of Pippin and Galbraith Roads (R 729). Singleton's purpose was to buy a pack of cigarettes. Singleton noticed that although the booth appeared to be open there was no attendant in sight. After approaching the booth and looking inside Singleton saw an open cash box on the counter (R 732). He also saw a body lying on the floor in the booth. Singleton at once checked the body, found no pulse, (R 733) and called the police.

Officer Gorski of the Hamilton County Sheriff's Office responded, examined the body of the attendant, and determined that he was dead (R 798). Gorski secured the scene and

called for a detective and a supervisor. An examination of the deceased, a high school student named Jeff Stall, revealed a bullet wound in the chest and an exit wound in his back. A bullet slug was found on the floor of the service booth. The Sheriff's Office began its investigation at once, with Detective McClaren on the scene at 1:40 a.m. on the 20th to take charge (R 841). It was determined that about $166.00 was missing from the station (R 793).

The Sheriff's Office was aware that earlier in the evening of the 19th, there had been an incident involving a gun in the Skyline Acres subdivision. This subdivision is within easy walking distance of the Speedway Station, and is also in the Colerain Township area of Hamilton County. At approximately 9:00 p.m., on April 19th, two men and a juvenile had pulled a gun on a young man named Harold Enoch. (R 743). This incident occurred in the driveway of a residence occupied by Ann Heisel. The three males who had the gun at that time were Leon Leary, a juvenile, Kevin Metz and this defendant Tyrone "Chico" Williams (R 742). At the conclusion of this episode the gun was in the possession of defendant Williams (R 743-4). The Sheriff's Office decided to interview these three for informational purposes. Leon Leary was picked up first, and a short time later Kevin Ketz was arrested. The police took statements from these two, and as a result of these statements the police determined that this defendant, Tyrone Williams, should be arrested. (R 845).

2) Arrest of defendant Williams and first confession:

Five police officers went to the home of Tyrone Williams at about 7:00 a.m. on April 20th. Among these officers was Deputy Sheriff Robert Pieper. Officer Pieper knew the defendant from having previous contact with him. (R 51). After being admitted to the house with the consent of another occupant, the officers located Tyrone Williams near the back door and placed him under arrest and handcuffed him (R 53 & 847). While defendant Williams was being handcuffed Officer Pieper fully advised him as to his Miranda rights (R 53 & 847). The defendant was then removed from the house and taken to the front yard. Again Officer Pieper fully advised defendant

Williams as to his Miranda rights (R 54,55 & 847). Officer Pieper told Williams that he was wanted in connection with the robbery and homicide at the Speedway Gas Station (R 53 & 847). Pieper told Williams that there was a gun used in the crime and the police believed it was concealed in Williams' house. Pieper asked defendant Williams to cooperate and give up the gun, and further told him that in any event, the police would obtain a warrant and come back later and search for it (R 55 & 847). Williams told the police that the gun was concealed in a stereo set and he led the officers to it. (R 56 & 484). The gun was placed in an evidence bag and taken along with the officers. When defendant Williams was placed in the police cruiser he was again advised as to his Miranda rights. This time Officer Pieper read the Miranda rights to the defendant from his printed card (R 849).

After advising Williams of his rights in the car (the third time in a very short period of time) Pieper asked Williams if he wished to say anything (R 850). Defendant Williams at this time gave Pieper a statement admitting his complete involvement in the robbery-homicide at the Speedway Station. The gist of this statement was as follows (R 850).

1. Defendant Williams, Metz and Leary went to the Speedway Station fully intending to rob it.
2. The trio of robbers knew the attendant, Jeff Stahl, but did not know he was working that night.
3. Defendant Williams was carrying a .38 revolver.
4. Williams and Metz stood at the booth and ordered Stahl to pass out the money.
5. During the course of the robbery the gun went off <u>accidentally</u> and struck Stahl.
6. That he (Williams) went into the booth and determined Stahl was dead and then fled from the scene.
7. The robbers did not wear masks because they did not know Stahl would be working.

This was as far as Williams got with his statement since at this point the cruiser had arrived at Patrol Headquarters and Pieper quit talking to him (R 853).

3) Defendant's taped statement:

Upon arriving at Patrol Headquarters, Williams was turned over to Detectives McClaren and Simmons. (R 70 & 860). Defendant Williams told Simmons and McClaren that he wished to make a statement, (R 72,78) and those officers asked him if he would repeat on tape what he had told Officer Pieper. (Exhibit #2). Williams agreed to do this. At this point (7:40 a.m.) a taped statement was taken from defendant Williams. On appeal defendant contends his statement was not voluntary. The portions of the statement relative to this issue are as follows:

"Q. At this time Tyrone I am going to read you your rights. I want you to answer after me whenever I ask you a question, okay?

A. Yes.

Q. You are hereby advised that you have the right to remain silent. Do you understand that?

A. Yes.

Q. You do not have to say anything unless you choose to do so. Do you understand that?

A. Yes.

Q. Anything you do say may be used against you in a court of law. Do you understand that?

A. Yes.

Q. You have the right to consult with an attorney prior to being questioned. Do you understand that?

A. Yes, sir.

Q. You have the right to consult with an attorney prior to being questioned and you have the right to have an attorney with you during any questioning now or in the future. Do you understand that?

A. Yes, I understand.

Q. If you cannot afford an attorney you will be provided with one without cost prior to any questioning. Do you understand?

A. Yeah.

Q. If you do not have an attorney presently available, you have the right to remain silent until you have had an opportunity to consult with one. Do you understand?

A. Yes, sir.

Q. You can decide at any time to exercise these rights and not answer any questions

or make any statements. Do you understand that?

A. Yes, sir.

Q. If you decide to answer questions now, with or without a lawyer, you still have the right to stop the questioning at any time for the purpose of consulting a lawyer. Do you understand that?

A. Yes.

Q. With those rights in mind do you want to talk to us at this time?

A. Depending on what?

Q. Did you understand what I just said?

A. Yes.

Q. Do you wish to talk to us at this time?

A. I would like to have an attorney, you know. (unintelligible . . . see p. 20 infra)

Q. Okay Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also weren't they?

A. Yes, sir.

Q. Okay, you understood the part where it said you could start to talk to us and stop at any time you wanted to, didn't you?

A. Yes.

Q. Okay, you understood each and all of your rights?

A. I surely did.

Q. Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or . . .

A. I know I can say I didn't plan no robbery. I have no idea of it at all.

Q. Well we have to . . . , in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guy's side of the story but we don't know just exactly what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said, you can stop at any time or you can have an attorney. That's your perogative.

A. (defendant gives statement.)"

At this point the defendant gave a statement which was mostly exculpatory in nature. In the statement defendant Williams also stated he voluntarily gave the gun to the arresting officers, and that his taped statement was being given voluntarily.

4) Jury contact with witness; voir dire of certain jurors:

After a jury was impanelled, and before evidence was presented the jury was taken for a view of the scene. This occurred on a Friday afternoon. When trial reconvened on Monday, defense counsel moved for a mistrial based on alleged conversation between the jurors and the manager of the Speedway Station, who was to be a witness at trial. (R 701). The station manager allegedly had directed the jurors' attention to the dent in the wall made by the bullet after it passed through the body of Jeff Stahl. This was also one of the things which the bailiff was pointing out to the jurors (R 702).

The trial court asked the jury if anyone had heard the remark at the view and five (5) jurors indicated that they had (R 705). All five of these jurors were voir dired by the trial court in chambers in the presence of the Judge, the prosecutor and defense counsel (R 705 et seq.) There is a reporter's note in the record (R 705) that defendant was not present. Petitioner's brief repeatedly uses the word "Excluded" to describe his absence. In fact, defendant was present in the courtroom when this occurred. Neither he nor his counsel requested he be brought into chambers. All five of the jurors indicated that they were not affected in any way by what occurred, and indicated that they could return an impartial verdict (R 705-713).

On appeal defendant contends that one of those five jurors, Juror Kopp, should have been excused, because her voir dire revealed she could not be impartial. The voir dire of Juror Kopp is as follows:

"COURT: Miss Kopp.

KOPP : Well, I just heard someone make a statement in there.

COURT: Who?

KOPP: This service station attendant that was inside that little cubicle.

COURT: He made a statement?

KOPP: Yeah. That's all.

COURT: What was the statement?

KOPP: About where the bullet hole was.

COURT: About where the hole was?

MR. GAINES : She stated bullet hole, I believe, Your Honor.

COURT: Is there anything about what was said that would prejudice you in any way?

KOPP: No, I don't believe so.

COURT: Will you set aside anything you heard from your mind and not be influenced by it?

KOPP: Yes.

COURT: Okay. Miss Kopp, I'm going to ask that you step outside. Go to the jury room.

MR. CARR: Just a minute, Miss Kopp. I do want to instruct you that what was said was not evidence and it should not be considered in any way and you have assured me that you will not consider it in any way, is that correct? Would you say yes for the record?

GAINES: I think the record should reflect that the prospective juror shrugged her shoulders.

COURT: Will you disregard it and not consider it in any way?

KOPP: Yes, I suppose so.

COURT: Okay. Thank you.

GAINES: I believe the answer was, yes, I suppose so. I would like the record to reflect that.

COURT: Ma'am, did you want to say something?

KOPP: I don't know. I'm confused about the whole thing.

COURT: Well, I'm asking you to set aside anything you have heard which you said you would do originally when you were accepted as a juror. Will you do that?

KOPP: Yes.

COURT: Thank you.

GAINES: Your Honor, I hate to . . . the juror seems to have some reservations. I don't know.

COURT: She's indicated she will . . ." (R 707)

As can be seen the trial court was quite careful to make sure juror Kopp could be impartial. The statement by the juror to the effect that "I'm confused by the whole thing . . ." did not refer to her ability to be impartial, but to the procedure which was being followed. Other factual issues will be developed under the appropriate arguments.

REASONS FOR DENYING THE WRIT

1. Where a suspect has been advised of his Miranda rights and gives a statement, and subsequently agrees to repeat the statement on tape, and after being again advised of his rights on tape indicates some confusion, the officers may properly again review the suspect's Miranda rights with him, and continue questioning if the suspect desires to proceed.

Defendant contends that the trial court erred in overruling his motion to suppress. Defendant wanted to suppress three specific items of evidence at trial.

1. The murder weapon,
2. Defendant's oral confession to Officer Pieper,
3. Defendant's taped confession.(Exhibit #2 at the Motion to Suppress.)

There is no basis whatsoever in the record to suppress either the murder weapon or the oral confession. The testimony at the motion to suppress indicated that defendant Williams was twice advised of his Miranda rights and then voluntarily showed police where the gun was concealed. Defendant even states in his taped confession that he voluntarily revealed the gun's hiding place to the police. With regard to defendant's oral statement to Officer Pieper the record reveals that defendant was given his Miranda warnings three times before any attempt was made to question him. Only after these warnings did defendant give the statement to Officer Pieper. With regard to the gun and the oral statement there is no basis at all to reverse the trial court's ruling. At best defendant raises only issues of credibility which were resolved against him by the trial court and cannot be challenged on appeal. Burks v. United States, 98 S. Ct. 2141 (1978); State v. Antill, 176 O.S. 61 (1964); State v. DeHass, 10 O.S. 2d 230 (1967). It is submitted that the murder weapon and the oral confession to Officer Pieper were both properly admitted into evidence.

The third item of evidence at issue, defendant's taped statement, presents more difficult issues. Briefly stated, the facts are as follows. The defendant was arrested, advised of his rights and gave an oral statement to Officer Pieper while being transported to the Sheriff's Office. Upon arrival at the Sheriff's Office defendant Williams was turned

over to Detectives McClaren and Simmons. Defendant Williams told these officers that he wanted to give a statement (R 72,78). These officers then began to take a taped statement from Williams. The first portion of the tape is a full, complete and careful covering of the Miranda rights. Miranda v. Arizona, 384 U.S. 436 (1966). Then the following exchange occurs.

"Q. With these rights in mind do you want to talk to us at this time?

A. Depending on what?

Q. Did you understand what I just said?

A. Yes.

Q. Do you wish to talk to us at this time?

A. I would like to have an attorney, you know. (There is an inaudible answer here which may or may not be 'I don't have one' or 'I can't afford one'. In view of the audible answer the exact wording of this portion is insignificant.)

Q. Okay Tyrone, that is your privilege of course. Your rights were explained to you by the patrolman also, weren't they?

A. Yes, sir.

Q. Okay, you understood the part where it said that you could start to talk to us and stop at any time you wanted to, didn't you?

A. Yes.

Q. Okay, you understood each and all of your rights?

A. I surely did.

Q. Okay, is it your choice then that you wish not to talk to us at this time or would you like to start to talk to us or . . .

Q. Well we have to . . ., in other words we don't know what we are talking about really or what you are trying to tell us until we can hear your side of the story which we have heard from the other two guys' side of the story but we don't know just exactly what your side is. We are completely in the dark sitting here like this. So if you wish to talk to us as your rights said you can and stop at any time or you can have an attorney. That's your perogative.

A. (defendant begins to give statement.)

Appellant contends that once he asked for counsel all questioning must cease until he has counsel. Appellant feels that there is a per se rule that calls for exclusion in a

case like this. It is appellee's position that in the context of this statement, where defendant first told police that he wished to give a statement, that what occurred here was entirely proper. The defendant indicated some confusion or misunderstanding of his rights. The officer did not attempt to continue questioning, but instead went back over the rights with the defendant. This was the correct procedure to follow in this situation. The defendant had expressed contradictory positions, and the officer went back over the rights to ascertain just what the defendant wanted to do. There are two possible interpretations of what defendant Williams meant when he said he would like an attorney. The most likely interpretation, in view of the fact that he had told the officers he wanted to give a statement, is that Williams was momentarily confused over what was occurring, or had said something he did not intend. The second possible interpretation is that Williams was equivocating back and forth over his desire to give a statement. In either case the officer's response of going back over Williams' right to counsel with him was the correct response. Once defendant Williams mentioned a desire for counsel (which contradicted his earlier statement) interrogation ceased and the officers reviewed with Williams his right to counsel. This was done in a non-coercive manner, and was reaffirmed to Williams even after he began to talk. (See Exhibit 2 at motion, page 2, as set out above.)

Even after a defendant asserts one of his Miranda rights there is no per se rule which prevents further questioning. Michigan v. Moseley, 423 U.S. 96 (1975): Hill v. Whealon, 490 F. 2d 629 (1972); Jenning v. United States, 391 F. 2d 512 (1968); State v. Doak, 49 O.A. 2d 161 (1975). The real test to be applied in such a situation (as here) has been stated as follows:

> ". . . whether the prosecution has sustained its heavy burden of establishing that (the defendant) was fully informed of and understood his rights and whether, having once expressed his decision to exercise them, he later changed his mind and knowingly and understandingly declined to exercise them." United States v. Cavallino, 498 F. 2d 1200 (1974)

The time frame in which such reconsideration is urged is not a crucial factor. Wilson v. Henderson, 584 F. 2d 1185 (1978). The Cavallino case, supra, and United States v. Kallvig, 534 F. 2d 411 (1976) both involved requests for counsel followed by continued questioning, and in both cases the courts refused to apply a rule of per se exclusion. A claim identical to that raised here by appellant was considered and rejected in United States v. Collins, 462 F. 2d 792 (1972) cert. denied, 93 S. Ct. 343. Headnote #3 and #4 in the Reporter read as follows:

> 3. That defendant, who was considerately was several times asked to reconsider and at one time exhorted to re-evaluate his decision not to talk did not render his confession inadmissible on grounds that there had been "refusal of the agents to terminate their interrogation of defendant despite his repeated requests that they do so."
>
> 4. If reconsideration of accused's decision not to talk is urged in careful, non-coercive manner at not too great length and in context that accused's assertion of his right not to speak will be honored, it does not violate requirement that police not ignore an accused's stated wish to have interrogation cease.

The procedure suggested in Collins was exactly what was followed here. Petitioner's rights to counsel were reviewed and petitioner was told the choice was his, that his desires would be honored. The petitioner here had expressed contradictory positions. First he had waived counsel and confessed to Officer Pieper and requested to give a statement to Officers McClaren and Simmons. Then defendant mentioned a desire for counsel. In view of these contradictory positions the officers ceased questioning and reviewed defendant's subsequent confession was properly admitted.

Petitioner contends that the decision of the Supreme Court in Rhode Island v. Innis, _____ U.S. _____, 100 S. Ct. 1682 (1980) is supportive of his claim that his taped confession should be suppressed. It is the position of appellee that Innis is not in point, and is not helpful to a resolution of the issues in this case.

Petitioner feels that the issue here is that where a

request for counsel is clearly articulated and police ask questions designed to get an answer that Innis calls for suppression. To begin with there is no "clearly articulated" request for counsel's presence. The language involving the so called request for counsel is so low as to be inaudible and is practically incomprehensible.

Petitioner seeks to narrow the issue presented to a consideration of only one question and answer. It is the position of respondent that the entire background of the statement must be looked at to see just what petitioner intended by his remark and whether the police response was proper. This petitioner had already been advised of his rights three times, had given police the murder weapon, and had already given a complete oral confession to the crime. The tape recorded statement at issue here was being taken at the specific request of defendant (R 72-78), who wanted to tell his side of the story since his co-defendants had already spoken. Against this background it was entirely proper for the police to review defendant's rights with him when he suddenly requested counsel. It was entirely possible that he had not meant to say what he did, and police were entitled to review his rights with him and ascertain whether or not he wished to give a statement.

The Innis case is not in point here. Innis involved a suspect arrested for murder, who, while being transported by police, overheard remarks concerning their fears that little children would find the murder gun and harm themselves. Upon hearing these remarks the defendant decided to tell the police where the murder weapon was concealed. This case (Innis) involved facts remarkably similar to those of the 'christian burial speech' in Brewer v. Williams, 430 U.S. 387 (1977). The holding in Innis is quite simply that police cannot avoid the strictures of Miranda by using methods which at first glance do not seem to be interrogation. The whole point of Innis was to define just what is interrogation. This has no bearing on defendant Williams. He was in custody, at a police station, and was being advised of his rights.

The issue in this case is whether a defendant who makes a request inconsistent with his whole attitude can be questioned as to how he desires to proceed. In essence the issue here is one of clarification.

Defendant also asserts that the use by the police of the "old ploy" of stating that co-defendants have spoken was improper and tricked him into speaking. On examination of the transcript it is revealed that this remark was not made until after defendant had already begun to talk, and had in fact given a statement to Officer Pieper. Further, the remark was correct, both co-defendants had spoken to police and incriminated defendant Williams. If telling the truth is an improper "ploy" there is not much left to use to elicit statements from suspects. In fact, the police were totally candid with defendant, who now urges that society be penalized for the constable's honesty. It is submitted that the taped confession was properly admitted.

It is the position of appellee that even if the taped statement was improperly admitted into evidence that such error was harmless beyond a reasonable doubt. Thus Court, in Chapman v. California, 386 U.S. 18 (1967), held that even constitutional error can be harmless if a Court finds beyond a reasonable doubt that defendant would have been convicted even if error had not intervened. Even if a violation of Miranda is constitutional error, there can be no doubt that such error in this case was harmless. The test for defining harmless error has been stated as follows:

> "If the error alleged is constitutional in nature and if the court finds that there is overwhelming evidence of the defendant-appellant's guilt, aside from the disputed material, then it must hold that the error is not prejudicial but harmless beyond a reasonable doubt and affirm the judgment of the trial court." State v. Davis, 44 O.A. 2d 335 (1975).

In the present case, even disregarding defendant's taped confession, which was exculpatory in nature and supported defendant's claim of accident, there was overwhelming evidence of guilt. The record contained the following evidence independent of the taped confession, which support defendant's

conviction

1. Defendant's oral confession to Officer Pieper.

2. Testimony that defendant gave the murder weapon to the police.

3. Testimony that defendant had the murder weapon earlier in the evening on April 19th.

4. Defendant's admission to Annette Wright that he shot the "dude" because he made him mad. (R 816)

5. Defendant's admission to Evelyn Bouragge that he shot someone. (R 827).

6. Defendant's admission to Michelle Anderson that he shot the "dude" because he made him mad. (R 837).

7. Evidence that the shot could not have been accidentally fired.

8. Defendant took the stand and admitted the shooting but claimed it was accidental.

This evidence alone was more than sufficient to sustain defendant's conviction. It might be further noted that even defense counsel thought the questioned taped statement was exculpatory since he insisted that the tape be played for the jury during deliberations (R 1029).

Two cases involving identical issues are Wilson v. Henderson, 584 F. 2d 1185 (1978) and United States v. Kallvig, 534 F. 2d 411 (1976). Both cases involved statements taken after a defendant had requested counsel and in both cases the court stated that even if the admission of the statements was error, it was harmless error. In Wilson the Court stated:

> "Even if the admission of the statement to Cullen had been improper, we would be inclined to find the error harmless. (citation omitted). The allegedly tainted evidence did no more than place Wilson at the scene of the crime, a fact which was confirmed by the testimony of several eyewitnesses. The statement, therefore, was cumulative evidence and its admission was harmless beyond a reasonable doubt."

The same rationale applies in the present case. Defendant's first confession to Officer Pieper was much more incriminating of defendant Williams and was properly before the jury. Also before the jury were the defendant's admissions to three separate witnesses and the defendant's own testimony. In view of this, any error in admitting the taped statement was harmless beyond a reasonable doubt.

2. A trial court's ruling on a challenge for cause is a discretionary matter, and the burden is on the party challenging the juror to show the actual existence of an opinion which renders such a jury unfit. Absent such a showing a trial court's ruling will not be disturbed on appeal.

After the jury view was conducted but prior to the taking of any evidence, it was called to the court's attention that five jurors had contact with an unauthorized person at the view. In response to this the Court conducted an in-chambers voir dire of the five jurors to determine if they could remain impartial. Petitioner contends that one of these jurors, a Mrs. Kopp, should have been excused for cause. Of course, the unauthorized contact was of such an insignificant nature that it is hard to understand the furor now being raised. One of the purposes of the view was to see the bullet scar in the interior wall of the service station booth. The booth was quite small and only a few people could enter at one time. The bailiff was supposed to point this out to the jurors. The unauthorized contact consisted of the service station manager pointing the scar out instead of the bailiff. That was the sum total of the unauthorized "contact".

In response to the defendant's motion for mistrial the trial court conducted a voir dire of the five jurors. Petitioner claims that one of these jurors should have been excused for cause. The voir dire of the challenged juror is set out in the factual statement, earlier in this brief. Clearly it does not show a juror who is impartial or biased. The Ohio law in this area is clear.

The decision as to whether a juror should be excused for cause is for the sound discretion of the trial court. A trial court's ruling on a challenge for cause will not be overturned unless it appears that the court has clearly abused its discretion. State v. Wilson, 29 O.S. 2d 203(1972); State v. Vails, 22 O.S. 2d 103 at 105 (1970). This is in accord with the general rule of review as to any discretionary rulings by the trial court. See, for example, State v. Hymore, 9 O.S. 2d 122 (1967) (admission of evidence). This defendant argues here that the trial court erred in allowing juror Kopp to remain on the jury. In order to

sustain this argument defendant must show a clear, patent abuse of discretion on the part of the trial court. In resolving this issue the appellate courts have been directed not to "second guess" the trial court. State v. Wilson, 29 O.S. 2d 203 at 211 (1972).

The Ohio law cited above is also in conformity with federal law. Reynolds v. United States, 98 U.S. 145 (1898); Holt v. United States, 218 U.S. 245 ( ); Irvin v. Dowd, 366 U.S. 717 (1961). These cases hold that the trial court's ruling on a challenge for cause will be set aside only where the error or prejudice is manifest. Furthermore, the burden is on the one challenging the juror to make an affirmative showing that the juror cannot be impartial. The record here completely fails to substantiate the claims of the petitioner.

In examining the voir dire of juror Kopp the court can see that her use of the phrase: "I'm confused about the whole thing" (707) was in reference to the unusual voir dire that was being conducted, not about her ability to be impartial. When asked by the court if she could set aside everything she had heard at the view she replied, "yes". Earlier she had told the court that she "didn't believe" she would be prejudicial and that she "supposed" she could disregard what she had heard. Depending on how such phrases are used, tone of voice, demeanor, etc., they can be solid affirmations or equivocations. The trial court carefully questioned juror Kopp, listened to her, and observed her as she spoke. The record here supports the trial court's decision to leave her on the jury. This is particularly true when the record of the entire voir dire of juror Kopp is reviewed. In making his decision the trial court is entitled to rely upon all his knowledge as to this juror, including that gained from the initial voir dire. During her original voir dire juror Kopp unequivocably indicated she would disregard anything she heard outside the courtroom and decide the case only on the evidence, (R 497) and that there was nothing which would prevent her from being impartial (R 501). Interestingly, juror Kopp indicated she was opposed to the death penalty, (R 495) which would seem to indicate an intention to be very fair. During her initial voir dire,

defense counsel examined this juror and raised no challenge. It is submitted that the trial court, with this initial voir dire in mind, and the pertinent answers to the subsequent voir dire, did not err in leaving juror Kopp on the jury.

3. The voluntary absence of a defendant from an in-camera voir dire of a juror, where defense counsel is present, is not a violation of fourteenth amendment guarantees of due process.

After trial commenced (a jury had been empaneled and a jury view conducted), in response to defendant's motion for mistrial, the trial court conducted an in-camera voir dire of five jurors. Defense counsel was present and participated. A court reporter's notes indicate defendant Williams was not present. There is nothing in the record to indicate defendant was excluded from this hearing. Defense counsel never requested that petitioner be brought in, and never objected to his absence. In view of this it can only be assumed that petitioner's absence was voluntary. Thus counsel's constant repetition of the claim that petitioner was "excluded" is a misstatement of the facts. He was not excluded, his trial counsel simply did not bring him in. Since no objection was raised at the trial level, Ohio law bars this issue from being considered on appeal. State v. Childs, 14 O.S. 2d 56 (1968); State v. Williams, 51 O.S. 2d 112 (1978). Sylabus paragraph number one in Williams states:

> "An appellate court need not consider an error which a party complaining of the trial court's judgment could have called, but did not call, to the trial court's attention at a time when such error could have been avoided or corrected by the trial court."

This rule is particularly appropriate here since the trial court could have, if requested, brought the defendant into chambers. There is no reason whatsoever to assume such a request would be denied. The failure to object was a waiver, and this waiver rule applied even if the alledged error is constitutional in nature. State v. Phillips, 27 O.S. 2d 294 (1971); State v. Davis, 1 O.S. 2d 28 (1964). This court has always honored state contemporaneous objection requirements. Mapp v. Ohio, 367 U.S. 643, n. 9 (1961). It is submitted that this matter is not properly raised on appeal.

Ohio Crim. R. 43 (A), Defendant's presence, provides that once trial has commenced, it may proceed in the defendant's voluntary absence. Since no one excluded the petitioner, and since trial counsel did not request his presence, it must be assumed his absence was voluntary, and the voir dire properly conducted in his absence.

Even if petitioner should have been present his absence was surely harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). As the Ohio Appellate Court pointed out:

> "The instant case, however, can be distinguished from these cases in that the incident in question took place early in the trial, before any evidence was presented, not during the critical stage of jury deliberations. All that transpired at the hearing is on the record, and we have already ruled that the court did not abuse its discretion in allowing the trial to continue with the original jurors."

There is no real indication as to how petitioner would have aided counsel in conducting the voir dire. Further, the subject matter of the voir dire concerned factual material of which petitioner would have no knowledge.

In Nevels v. Parrott, 596 F. 2d 344 (1979) the Eighth Circuit held that the defendant's absence in a similar situation was harmless beyond a reasonable doubt because of the showing that the juror remained impartial. Such a showing was clearly made here. First of all the "unauthorized conduct" was absolutely and undeniably not something that would affect a juror's impartiality. Quite simply it is being blown completely out of proportion and context. Secondly, the trial court conducted a voir dire of this juror and made a finding of continued impartiality. Respondent suggest that any error was harmless beyond a reasonable doubt.

4. Matters not raised at trial will not be considered by an appellate court.

5. Police officers may make a warrantless arrest of a murder suspect in his home within hours of the commission of the murder, where the failure to act at once will allow destruction of evidence and the escape of the felon.

(ARGUED TOGETHER)

Petitioner contends that he was arrested in his home without a warrant. The arrest occurred in April of 1977. Sometime after this case was tried this court released its decision in Payton v. New York, 100 S. Ct. 1371 (1980). The holding in Payton was that warrants are required before a suspect may be arrested in his home. Defendant urges that since he was arrested without a warrant that his motion to suppress should have been granted. Defendant concedes in his brief that this issue was not raised at trial. It is the position of the state that having failed to raise this issue at trial defendant may not now raise it on appeal. Ohio law in this area is clear, see for example, State v. Williams, 51 O.S. 2d 112 (1978); State v. Childs, 14 O.S. 2d 56 (1968). This waiver rule also applied to constitutional issues. State v. Davis, 1 O.S. 2d 28 (1964); State v. Phillips, 27 O.S. 2d 294 (1971). In Mapp v. Ohio, 367 U.S. 643 (1961) the court stated in footnote 9:

> "As is always the case, however, state procedural requirements governing assertion and pursuance of direct and collateral constitutional challenges to criminal prosecutions must be respected."

This is direct acceptance and approval of the waiver rule. An issue must be raised at trial or it will be deemed waived on appeal. Defendant, relying on O'Connor v. Ohio, 385 U.S. 92 (1966), argues in his brief, however, that he was not required to be clairvoyant, that he could not anticipate Payton and that therefore he is excused from raising an objection at trial. In support of his position defendant states that the Payton case "changes the law". This surely cannot be right. Appellee has always thought that "law" was made and changed by the legislature, and that it was the court's function to interpret law, and measure it against the constitution.

If Payton truly "changed" the law, then how could it be applicable to a case which was tried 2½ years before Payton

was decided? The only way Payton could be applicable in this case is if it was a constitutional ruling (which it is) and is applicable to pending cases. If Payton is indeed based on the constitution (which it is) then its holding has in reality been good constitutional law all along. This being so defendant is not excused from objecting at trial, and his failure to do so amounts to a waiver.

One other matter with regard to this issue. Since the question was not raised at trial there obviously was no record made of facts pertinent to this issue. To be honest appellee cannot concede, from the record, for a certainty, that this was in fact a warrantless arrest. Nor was any purposeful record made as to any exigent circumstances which may have justified a warrantless arrest. This points out the purpose and necessity for raising this issue at trial.

Even if this issue has been properly preserved for trial it is without merit. The warrantless arrest in the present case was justified by exigent circumstances. The defendant in Payton was arrested after two days of intensive police investigation. The defendant in Riddick (the companion case to Payton) was arrested 3 years after the crime was committed. On the facts then a warrant could have been obtained in both cases. The Supreme Court specifically held in Payton that some warrantless arrests in homes would be proper based on "exigent circumstances".

> "Before addressing the narrow question presented by these appeals, we put to one side other related problems that ate not presented today. Although it is arguable that the warrantless entry to effect Payton's arrest might have been justified by exigent circumstances, none of the New York courts relied on any such justification. The Court of Appeals majority treated both Payton's and Riddick's cases as involving routine arrests in which there was ample time to obtain a warrant' and we will do the same. Accordingly, we have no occasion to consider the sort of emergency or dangerous situation described in our cases as 'exigent circumstances' that would justify a warrantless entry into a home for the purpose of either arrest or search."

It is the position of appellee that the warrantless arrest of defendant Williams was proper, based on the doctrine of

exigent circumstances.

Defendant Williams was arrested at 6:30 a.m., at most two hours after his co-defendants incriminated him. When arrested Williams was about to leave the back door of his house. Both of the co-defendants lived within blocks of the petitioner and it was only a matter of time until news of their arrest filtered down to him and he learned of their arrest. In a fast breaking case such as this police had to act quickly or the defendant could be alerted and flee, or conceal necessary evidence such as the gun and stolen merchandise. These are exigent circumstances which justified a warrantless arrest. Warden v. Hayden, 387 U.S. 294 (1967). The need for quick action has been recognized by the court to obviate the need to follow constitutional requirements. Mincey v. Arizona, 437 U.S. 385 (1978). In the present case the necessity to act at once overrode the warrant requirement. (Petitioner's assertion in his brief that a warrant could have been obtained in minutes is incredible and simply not true.)

Finally, it is submitted that the statements at issue here were not the product of the arrest, (be it legal or not). In both Payton and Riddick the court suppressed physical evidence found in the defendant's home at the time of the arrest. Obviously these items were found because of the arrest. Neither Payton nor Riddick involved suppression of a confession. The confession here was not the product of the warrantless arrest. There was ample probable cause to arrest the defendant and a warrant could have been obtained. Once arrested this defendant was going to be questioned. The confession was the product of the questioning, and the questioning was initiated only after the defendant had been thrice advised of his rights. It is the position of the state that the confession was not the product of the arrest, and that the Miranda warnings, repeatedly given, were an intervening factor which removed any taint from the supposedly illegal arrest. This is particularly true here since the flaw in the arrest is merely the failure to obtain a warrant. There is no challenge to the existence of probable cause.

Petitioner argues in his brief that this case squarely

presents the issue left open by Payton and Riddick concerning consent of others to enter and a request that police leave. This case is not the appropriate vehicle to raise on review these issues. Since the matter was not raised by petitioner at trial, no evidentiary record of these issues was made. Thus this case is not one ripe for review in this regard.

4. (a) Matters not raised at trial or on direct appeal will not be considered by a higher level appellate court.

(b) The states may legislatively provide for consecutive sentences for a felony murder and the underlying felony, where the state felony murder statute requires proof of only one of a number of possible underlying felonies in order to support a felony murder conviction.

a.) Petitioner urges that he cannot be sentenced consecutively on both a felony murder and the underlying felony. This issue was not raised at trial, nor was it raised on direct appeal. It is the position of respondent that these failures prevent the raising of this issue now.

Ohio appellate practice has long recognized and followed the waiver rule, particularly where the issue is not raised in direct appeal to the Court of Appeals. Toledo v. Reasonover, 5 O.S. 2d 22 (1965); State v. Williams, 51 O.S. 2d 112 (1977); State v. Cornelly, 56 O.S. 2d 1 (1978). This Court has also recognized the right of the States to impose a contemporaneous objection rule. Mapp v. Ohio, 367 U.S. 643 (1961). Further, the failure of petitioner to raise this issue in the Ohio Appellate Court is a bar to its consideration by this Court. Cardinale v. Louisiana, 394 U.S. 437 (1969).

b.) Petitioner contends that he cannot constitutionally be sentenced for both felony murder and the underlying felony. In support of this proposition petitioner relies on Whalen v. United States, 445 U.S. 684, 100 S. Ct. 1432 (1980). Petitioner feels that Whalen establishes a constitutional double-jeopardy rule which prevents the imposition of sentence for both felony-murder and the underlying felony. It is the position of the respondent that Whalen is not a constitutional decision, but instead involves merely a

question of statutory construction. Further, under the test set forth in Blockburger v. United States, 284 U.S. 299 (1932) there is no constitutional bar to the imposition of sentence on both a felony murder and on the underlying felony. See also Illinois v. Vitale, 100 S. Ct. 2260 (1980).

The Whalen decision involved the interpretation of the Washington, D.C. felony murder statute. In essence the court determined that congress, when it enacted the statute, did not intend to authorize punishment for both the murder and the felony. In Whalen this Court framed the issue as follows:

> "In the present case, therefore, if congress has not authorized cumulative punishments for rape and an unintentional killing committed in the course of the rape, contrary to what the Court of Appeals believed, the petitioner has been impermissibly sentenced."

Obviously the Court in Whalen saw this not as a constitutional issue, but rather one of legislative intent in drafting criminal legislation. This belief is reinforced by the following langauge from the dissenting opinion of Justice Rehnquist.

> "Because the question before us is purely one of statutory construction . . . ."

In the cases decided since Whalen which contain references thereto, the Courts are unanimous in finding that Whalen is not a constitutional double jeopardy case, but is rather a case dealing with statutory construction. see United States v. Boylan, 620 F. 2d 359 (C/A 2, 1980); Mayes v. Sowders, 621 F. 2d 850 (C/A 6, 1980); Brown v. Alabama, 619 F. 2d 376 (C/A 5, 1980). In Boylan, supra, the defendant was convicted and sentenced on a R.I.C.O. count and on the underlying felony. The Court therein held that Whalen did not prevent such a sentence, and that such a sentence was permissible because that was the intent of the legislature. In Busic v. United States, ____ U.S. ____, 100 S. Ct. 1747 (1980), Justice Blackman authored a concurring opinion, joined in by Chief Justice Burger, which states that, in reference to Whalen, where a defendant is sentenced at a single proceeding the only question is what penalty does the legislature intend to be imposed. In sum, Whalen does not

announce a constitutionally based rule which prevents imposition of consecutive (cumulative sentence for felony murder and the underlying felony. Instead, Whalen finds that such consecutive sentences are permissible if they are legislatively mandated. Most states do in fact provide for such sentencing, see, for example, State v. Ruechert, 561 P. 2d 850 (Kan. 1977); Com. v. Sparrow, 370 A. 2d 712 (Pa. 1977); People v. Burton, 6 Cal. 3rd 375 (1975); Yates v. State, 233 S.E. 2d 750 (Ga.,1977).

Likewise the consecutive sentencing here does not run afoul of the rule in Blockburger v. United States, 284 U.S. 299 (1932). Blockburger adopts a "required evidence" rule rather than an "actual evidence" rule in analyzing double jeopardy issues. In applying this test the statutory elements of the crime are to be examined, not the actual evidence used at a particular trial. In the present case the aggravated murder conviction requires proof of a robbery, an element not found in the underlying felony. The felony of aggravated robbery requires proof of that specific act; while aggravated murder merely requires proof of a felony, not any particular felony. Thus the required evidence for aggravated murder and the underlying felony are not identical, and multiple conviction and sentence is proper.

Petitioner's citation to North Carolina v. Pearce, 395 U.S. 711 (1969) is not in point. Defendant is not being punichsed twice for the same act. He is being punished once for the aggravated robbery and once for the homicide. These are separate criminal acts, each committed with a separate animus. The legislature may properly intend separate punishment for each.

In analyzing the sentence in this petitioner's case the issues are twofold. First, did the legislature intend to provide for consecutive (cumulative) sentencing, and secondly, are the two crimes distinguishable under the "required evidence" rule of Blockburger. In determining the legislative intent as to sentencing the appropriate statute is Ohio Revised Code 2929.41, Multiple Sentences. That section specifically provides for the imposition of multiple sentences and sets forth a comprehensive scheme dealing with

various permissible minimum and maximum sentences in such situations. Ohio case law has implicitly accepted the imposition of such sentences. State v. Adams, 53 O.S. 2d 223 (1978); State v. Seoul, 53 O.S. 2d 123 (1978); State v. Wade, 53 O.S. 2d 183 (1978); State v. Jackson, 50 O.S. 2d 253(1977); State v. Osborne, 50 O.S. 2d 211 (1977). Finally in State v. Thomas, 61 O.S. 2d 254 (1980) the Ohio Supreme Court reviewed relevant Ohio and Federal law and found that multiple punishments were not barred in a robbery-involuntary manslaughter situation. In Thomas the Ohio Supreme Court indicated that in situations such as this that multiple sentences were correct. (61 O.S. 2d at 261). The Court also used the Blockburger required evidence rule in distinguishing the two crimes. It is submitted that both legislative intent and case law interpretation thereof support the imposition of consecutive sentences for felony murder and the underlying felony in Ohio. This indicates the sentences herein are not barred by the Whalen decision.

CONCLUSION

It is submitted that certiorari should not be granted in this case. Rarely does a single appeal present so many issues which were not raised in the lower courts, Petitioner's litany of the violations of his rights overlooks the fact that he, in cold blood, gunned down an innocent high school student and then proceeded to brag to numerous friends (all of whom testified at trial) that he "wasted some dude" because he made him mad. In fact there was no Miranda violation. The police scrupulously followed the law in that area. In fact this case was tried two years before Payton was ever decided. Thus petitioner's claims of police flagrantly trampeling rights secured by that case must be seen for the exageration that they are. An examination of the facts of this case shows that the Courts have scrupulously protected this defendant's rights at all times. The record here contains overwhelming evidence of defendant's guilt, including a prior unchallenged, confession and numerous admissions of guilt by the defendant to his friends. The issues raised by petitioner are not fresh or novel. In fact they have already been decided by this Court in earlier decisions; which decisions were followed by the lower Courts. It is submitted that certiorari should not be granted.

Respectfully submitted,

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IN THE

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TYRONE C. WILLIAMS,

Petitioner

-vs-

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THE STATE OF OHIO,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIRST APPELLATE DISTRICT, HAMILTON COUNTY, OHIO

Reply

PETITIONER'S RESPONSE TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

INTRODUCTION

The Petition filed herein was lengthy, containing no less than six questions presented. For the most part, we stand on the Petition, and no response to Respondent's Reply Brief is deemed necessary. A few issues, however, merit brief response.

I. THE CONSTITUTIONAL VIOLATION IN THE ADMISSION OF THE TAPE RECORDED STATEMENT.

Respondent states, at p. 13 of his Reply Brief: "Appellant (sic) contends that once he has asked for counsel all questioning must cease until he has counsel. Appellant (sic) feels that there is a per se rule that calls for exclusion in a case like this." Respondent is correct in assessing Petitioner's position, and the Reply Brief was written and filed before the announcement of this Court's decision in Edwards v. Arizona, 49 U.S.L.W. 4496 (Decided May 18, 1981).

In that case, this Court held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his

rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges or conversations with the police." Id., at 4498.

The foregoing excerpt from Edwards is precisely the rule which should have been applied below. The court below ruled that by further talking to police after asking for an attorney, Petitioner waived his right to counsel. There is no affirmative, expressed waiver on the record here, and the entire tape recording is available for review. Of course, waiver of the right to counsel will not be presumed from the silent record (on that point) present here, Carnley v. Cochran, 369 U.S. 506 (1962).

It must further be noted that, contrary to Respondent's assertions, the police conversation after Petitioner had exercised his rights by demanding counsel and questioning his ability to afford one was far more than a police conversation designed to truly ascertain whether Petitioner was serious in his desire to obtain counsel. The police used the old ploy of informing Petitioner that the two other suspects had given statements and suggesting that unless he spoke to the officers and gave his version, his version would never be known. Such tactics constitute exactly the sort of subtle interrogation condemned in Rhode Island v. Innis, 446 U.S. 291 (1980).

The decision below is thus also in conflict with Edwards v. Arizona, supra., as well as with Innis, Miranda, and practically every other self-incrimination case decided by this Court in the last fifteen years.

Respondent next insists that the admission of the tape recorded confession , even if erroneous, constituted harmless error, because Petitioner made oral statements to arresting officers before the tape recorded confession was secured in violation of his rights. It is true that the arresting officer testified that Petitioner made oral statements to the officer, and that the statements set forth by the officer (consuming but one page of the record) were basically the same as the version given on the tape, but the impact of the two were considerably different before the jury. It is one thing to hear a police officer read drily from his notes, and quite another to hear a tape recording approximately one-half hour in length, in the defendant's own words, recorded within 24 hours of the incident which he describes on the tape, emotionally discussing in much more detail the events which led to the fatal shooting. It must be noted further that in Ohio, even in the commission of a felony, a killing is not aggravated murder (the most serious degree) unless there exists at the time in the mind of the accused a purpose to kill.

Here, the oral statements to the officer indicated that the killing was accidental. While two other codefendants were present at the scene of the killing, neither testified. Petitioner's taped statement was the only eyewitness evidence presented to the jury. Since Petitioner alleged that the killing was accidental, his credibility was extremely crucial to the resolution of the issue raised by the defense of accident. The tape statement was played to the jury during the presentation of the prosecution's case in chief, and certainly had everything to do with the jury's evaluation of Petitioner's credibility. His oral statement to the officer presented the accident defense; his tape statement, obtained in violation of

his rights, materially assisted the jury in resolving hte credibility of his defense, and it resolved that credibility against Petitioner. Obviously, the admission of the tape recorded statement was prejudicial.

We note finally that the Court of Appeals below, though presented with the contention by Respondent that the confession on tape was harmless error because of the prior oral statements, did not even consider that argument, and certainly did not rule the error harmless beyond a reasonable doubt, as required by Chapman v. California, 386 U.S. 18 (1967). The State did not appeal, and cannot now raise the harmless error rule in this Court.

There is another aspect to the oral statements question presented by the State, and that is that the oral statements were given to police after the warrantless arrest of Petitioner in his home, in violation of Payton v. New York, 445 U.S. 573 (1980). Those statements should be ruled inadmissible under the doctrine set forth in Wong Sun v. United States, 371 U.S. 471 (1963), as we argue in our Petition. This being the case, the inadmissible oral statements cannot form the basis for a ruling that the admission of the inadmissible tape recorded statement was harmless error.

Respondent objects further that the Payton issue was not raised in the trial court or on appeal. Of course, Payton was decided two years after the trial herein, but, as stated in our petition, a motion to suppress was filed, Petitioner testified in the hearing on that motion that he demanded a warrant and asked the police to leave, and the Court below,

agreeing with our contention that O'Connor v. Ohio, 385 U.S. 92 (1966) required consideration of the issue on the merits, indeed ruled, albeit incorrectly, on the merits. There is thus no impediment to consideration of the issue by this Court.

Throughout Respondent's reply brief in opposition, it is claimed as to each error raised that the error was harmless, or that the claim was not properly preserved, or both. Except as to Question VI, the double jeopardy violation implicit in the consecutive sentences imposed on Petitioner for aggravated murder and aggravated robbery, all questions were raised and properly decided below. Respondent's harmless error claims were either not raised or denied by the Court below, which reached and decided the first five issues on their merits. Those claims by Respondent should get no more attention by this Court than they got below. The Petition ought to be granted and Petitioner's conviction reversed. The case should be remanded with instructions that will secure to Petitioner a fair trial, with only that evidence which was constitutionally obtained used against him.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of this Response was served on opposing counsel on May 29, 1981, by leaving same at his office, 408 Court House, Cincinnati, Ohio 45202.

H. FRED HOEFLE, Attorney for Petitioner